RECORD AND BRIEFS

15-1391

No. ____

MAY 12 2016
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In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of any petitioner's stock. Nor is any petitioner a subsidiary of any parent company.

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INTRODUCTION

Each time a consumer pays with a credit card, a merchant incurs a "swipe fee." These fees are typically passed on to all consumers through higher prices. But, if a merchant chooses, it may instead pass on the cost only to those customers who pay by credit card. It may do so by charging two prices: a higher price for those who pay with credit and a lower one for those who pay in cash.

All states allow such dual pricing. But ten states have enacted laws that seek to control how merchants may *communicate* the price difference to consumers. New York's law is illustrative: It allows merchants to offer "discounts" to those who pay in cash, but makes it a crime (punishable by up to one year in jail) to impose equivalent "surcharges" on those who pay by credit card.

A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. But consumers react very differently to the two labels, perceiving a surcharge as a penalty for using a credit card. Precisely because the surcharge label is more effective at communicating the true cost of credit cards and discouraging their use, the credit-card industry has long insisted that it be suppressed. No-surcharge laws in effect say to merchants: If you use dual pricing, you may tell your customers only that they are paying *less* to pay without credit (a "discount"), not that they are paying *more* to pay with credit (a "surcharge")—even though they *are* paying more for credit. Liability thus turns on the words used to describe identical conduct—nothing else.

Under these laws, a merchant who charges two different prices for a widget depending on how the customer pays (for example, $100 for cash and $102 for credit) may say that the widget costs $102 and that there is a $2 discount for paying in cash. But if the merchant instead

says that the widget costs $100 and there is a $2 surcharge for using credit to account for the swipe fee, the merchant has committed a crime.

The earliest reported prosecution of a state no-surcharge law targeted a New York gas station whose cashier made the mistake of truthfully telling a customer that it would cost "five cents extra" to pay with a credit card instead of saying that it would cost a "nickel less" to use cash. A court later vacated the conviction, however, because the law treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). "[I]t is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. In recent years, New York has continued to target merchants for truthfully informing their customers that they impose a "surcharge" for credit, even giving scripts with specific language so merchants could reframe the same information as a cash "discount."

The question presented is whether such a law comports with the First Amendment. Judge Rakoff answered no, holding that New York's law regulates only "the manner in which price information is conveyed to buyers," which is "protected by the First Amendment," and fails to withstand the requisite scrutiny. App. 74a. The Second Circuit reversed, concluding that the law regulates "merely prices," not speech. App. 21a.

Not long after the Second Circuit's decision, the Eleventh Circuit reached the opposite conclusion. It held that Florida's virtually identical law—under which a merchant may "offer a discount for cash," but "calling the same price difference a surcharge" could land the merchant in jail—"targets expression alone," and cannot survive scrutiny. *Dana's R.R. Supply v. Attorney Gen.*,

Fla., 807 F.3d 1235, 1239, 1245 (11th Cir. 2015). In so holding, the Eleventh Circuit joined Judge Rakoff and a California district court (which struck down that state's law as unconstitutional), setting up a "direct conflict" in the circuits. *Id.* at 1257 (Carnes, C.J., dissenting).

That conflict has only grown. More recently, a divided Fifth Circuit panel acknowledged the "circuit split" and upheld Texas's no-surcharge law. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016). The majority found the Second Circuit's reasoning "persuasive"—and the Eleventh Circuit's "unavailing"—and concluded that the law "regulates conduct, not speech." *Id.* at 80, 83.

A square split on such a fundamental constitutional question is reason enough to grant certiorari. But the conflict here is particularly undesirable because merchants need one clear answer to a question that affects the nation's economy: how they may present their prices to consumers. And until they get an answer, many merchants will refrain from dual pricing altogether, even though it is legal, because they cannot convey the cost of credit how they would like—as a credit-card surcharge.

The decision below also cannot be reconciled with this Court's precedent. A law that makes liability turn on how a merchant conveys truthful "price information" to consumers regulates speech, and must satisfy First Amendment scrutiny. *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Because this law "crumbles under any level" of scrutiny, *Dana's R.R. Supply*, 807 F.3d at 1239, the Court should grant certiorari and reverse.

OPINIONS BELOW

The Second Circuit's amended opinion is reported at 808 F.3d 118 and reproduced at 1a. The district court's decision is reported at 975 F. Supp. 2d 430 and reproduced at 55a.

JURISDICTION

The court of appeals entered judgment on September 29, 2015. App. 46a. On January 13, 2016, the court of appeals denied a timely petition for rehearing en banc. App. 88a. On April 5, 2016, Justice Ginsburg granted an extension of the time to file a petition for certiorari until May 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." New York's no-surcharge law provides: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means. Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both." N.Y. Gen. Bus. Law § 518.

STATEMENT

"What most consumers do not know is that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (2010). A prime reason for this is that the cost of credit has been kept hidden from consumers: Although merchants may charge consumers more for using a credit card, they cannot effec-

tively communicate that added cost because the credit-card companies have succeeded in insisting that any price difference be framed as a cash discount, rather than a credit-card surcharge.

This industry-friendly speech code has long been imposed through both private contract and state legislation. But a nationwide settlement in an antitrust class action required the credit-card companies to remove their contractual no-surcharge rules in early 2013. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). So state laws like New York's have now assumed sudden importance: They are the only thing stopping merchants from truthfully saying that they impose a credit-card "surcharge" because credit costs more.

New York's no-surcharge law makes it a crime, punishable by a $500 fine and up to one year in prison, for any "seller in any sales transaction [to] impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The law does not, however, outlaw dual pricing; "it permits offering cash customers a discount" if so expressed. App. 14a.

I. Why labels matter: the communicative difference between "surcharges" and "discounts"

A credit-card "surcharge" and a cash "discount" are just "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351 (2008). They are equal in every way except one: the label that the merchant uses to communicate that difference.

But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can per-

ceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because of people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991).

"Consumers react very differently to surcharges and discounts." Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to discounts (which are perceived as *gains* for not using credit). *Id.* Research shows just how wide this gap is. In one study, 74% of consumers responded negatively to surcharges, but fewer than half responded negatively to equivalent cash discounts. *Id.* at 280-81.

The effectiveness of surcharges is why the petitioners here seek to impose them. Surcharges inform consumers of the cost of credit and thus create meaningful competition, which in turn drives down that cost. If swipe fees are too high, consumers will use a different payment method, and banks and credit-card companies will have to lower their fees to attract more business.

II. The credit-card industry's efforts to prevent merchants from communicating the costs of credit as "surcharges"

The invisibility of swipe fees is no accident. It is the product of concerted efforts by the credit-card industry over many decades. Over the years, the industry has succeeded, both through contractual provisions and

legislation, in silencing merchants' attempts to call consumers' attention to the true costs of credit.

A. The industry's early ban on dual pricing and Congress's protection of cash "discounts"

In the early days of credit cards, credit-card companies banned any attempt at differential pricing between credit and cash by specific clauses in their contracts with merchants. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1990). But in 1974, Congress enacted legislation granting merchants a non-waivable right to "offer[] a discount" to induce consumers "to pay by cash, check, or similar means" other than a credit card. Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1666f(a)).

B. The credit-card industry shifts its strategy to labels

Consumer advocates initially considered the 1974 legislation a victory. But the credit-card industry, seizing on Congress's use of the word "discount," and the arguable ambiguity over whether the law allowed surcharges, soon shifted its focus to the way merchants could *communicate* credit pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing if surcharges were outlawed—the credit-card lobby "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986); *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980) ("[T]he credit card lobby turned its attention to form rather than substance. Specifically, it preferred that any difference

between cash and credit card customers take the form of a cash discount rather than a credit card surcharge.").

C. The industry's labeling strategy achieves short-lived success at the federal level

For a while, this lobbying paid off. In 1976, Congress passed a temporary ban on "surcharges," despite the authorization for "discounts." Pub. L. No. 94-222, 90 Stat. 197. But by the early 1980s, opposition to the ban grew as the Reagan Administration, consumer groups, and retailers all urged Congress to let it lapse.

Both opponents and supporters of the ban recognized that it hinged on semantics. A member of the Federal Reserve Board, which unanimously opposed the ban, testified about "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong. 9 (1981). "If you just change the wording a little bit, one becomes the other." *Id.* at 22. The Board thus proposed "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10.

Every major consumer-advocacy group agreed. One advocate testified that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," she explained, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas "the discount system suggests that consumers are getting a bargain, and downplays the truth." *Id.* The cost of credit is thus best "expressed in the form of [a] surcharge." *Id.* Another advocate put it more pithily: "one person's cash discount may be another person's surcharge." *Id.* at 90. "Removing the ban on surcharges," he said, "is an im-

portant first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Id.* at 92. President Reagan's Federal Trade Commission chairman also opposed the ban, saying that "a discount and a surcharge are equivalent concepts." *Id.* at 127.

By contrast, American Express and MasterCard "strongly" supported the ban, even though they too understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Id.* at 43, 55. And the big banks likewise supported treating "surcharges" and "discounts" differently because a surcharge "makes a negative statement about the card to the consumer" and "talk[s] against the credit industry." *Id.* at 32, 60. *See also* Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (quoting American Express spokesman emphasizing the "big psychological ... difference" between surcharges and discounts). Congress ultimately renewed the ban for an additional three years. Pub. L. No. 97-25, 95 Stat. 144 (1981).

Over the next few years, opposition to the ban intensified. In 1984, when it was again set to expire, Senator William Proxmire cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. This time, the ban lapsed. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

D. The credit-card industry lobbies states to enact no-surcharge laws and adopts contractual no-surcharge rules

After the national ban expired in 1984, the credit-card industry convinced ten states (including New York)

to enact no-surcharge laws of their own.[1] New York's law took effect later that year.

Its legislative history does not hide the fact that it aimed to influence consumers' perceptions of credit cards by controlling the labels that merchants could use to describe mathematically equivalent transactions. A memorandum justifying the state's support for the law declared: "Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." CA2 J.A. 114.

Around the same time that New York's law was enacted, the major credit-card companies changed their contracts with merchants to include no-surcharge rules. No-surcharge laws in New York and other states thus function as a legislative extension of the restrictions that credit-card issuers previously imposed more overtly by contract.

E. Enforcement of New York's law

Despite these parallel contractual rules, New York has policed its law with vigor. In the first reported prosecution, the state brought criminal charges against a gas-station owner who offered dual pricing and put up signs that "clearly stated the 'cash price' and the 'credit

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[1] *See* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509; Mass. Gen. Laws Ann. ch. 140D, § 28A(a)(1)-(2); Okla. Stat. tit. 14a, § 2-211(A); Tex. Fin. Code § 339.001; *see also* P.R. Code tit. 10, §§ 11, 12. An eleventh state, Utah, passed a similar law in 2013, only to repeal it a year later, after the district court's decision in this case striking down New York's law. Utah Code Ann. § 13-38a-202 (2013), *repealed by* § 63I-1-213 (2014).

price' for his gasoline," which differed by five cents per gallon. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1010 (N.Y. Crim. Ct. 1987). The owner was convicted because his cashier made the mistake of telling a customer that it would cost "five cents extra" to use a credit card instead of saying that it would cost a "nickel less" to use cash. *Id.* at 1009-14. The conviction was short-lived, however, because the court held that the law was unconstitutionally vague, for it treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011.

Fulvio may have temporarily dampened enforcement efforts, but it did not end them. In 2008 and 2009, the Attorney General brought a series of sweeps against more than 50 merchants, many of whom were targeted even though they clearly disclosed their prices, explaining that they charge a certain amount "more" to pay with credit. The Attorney General's office told them that this explanation was illegal and gave specific instructions on how to describe their pricing schemes to customers.

To take one example, Parkside Fuel, a small heating-oil seller, used to impose a credit-card fee, which it informed customers of "on the phone, at the same time that [it] informed them of [its] prices." CA2 J.A. 153. In 2009, someone from the Attorney General's office called "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [Parkside] charge[s] a fee on top of that price for using a credit card." *Id.* at 154. An Assistant Attorney General told Parkside's owner that, to comply with the law, he did not have to change any of the amounts that he charged, but his employees had to "characteriz[e] the difference between paying with cash and paying with credit as a cash 'discount,' not a credit 'surcharge.'" *Id.* The Assistant Attorney General then gave the owner "a script of what

[he] could tell customers when talking to them over the phone," saying that he "could quote the price [of heating oil] as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash," but he "could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon 'surcharge' to use a credit card." *Id.*

In another case, the Assistant Attorney General told the merchant: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." *Id.* at 162.

III. This litigation

A. In June 2013, not long after Visa and MasterCard dropped their contractual no-surcharge rules as part of the nationwide antitrust settlement, five merchants brought this case. Although their circumstances differ slightly, they all want the same thing: to truthfully tell their customers that there is an "additional fee" or "surcharge" for using credit.

Expressions Hair Design, for example, posted a sign informing customers that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% more for paying by credit. CA2 J.A. 98. But, in 2012, Expressions took down the sign after it learned of New York's law. *Id.* The salon now tells customers that it has two different prices—a lower price for cash and a higher one for credit. *Id.* But because of the law, Expressions cannot communicate its price difference how it would like—by calling the difference a "surcharge." It "would like to be able to put [its] sign back up." *Id.* at 151.

Like Expressions, the other four plaintiffs want to charge their customers two different prices depending on whether they pay with cash or credit and to call the difference a "surcharge" for credit. *Id.* at 79, 83, 88, 93.

These merchants do not offer cash discounts because they believe that "[l]abeling the difference as a 'discount' . . . would not be nearly as effective as calling it a 'surcharge.'" *Id.* at 88.

Just as important, the merchants are also concerned about complying with state law. Plaintiff Brooklyn Farmacy, for instance, is "not willing to take the risk that [it] might be prosecuted by the state simply for conveying truthful information to [its] customers about the higher cost of using a credit card." *Id.* at 89. The other merchants likewise worry that they could accidentally subject themselves to criminal liability if an employee makes "the mistake of telling customers"—truthfully—"that they are paying more for using credit cards." *Id.* at 94.

B. After filing suit, the plaintiffs moved for a preliminary injunction, arguing that the law violates the First Amendment and is unconstitutionally vague. In opposition, the state admitted that there is no difference between the two labels "in terms of the underlying economic value" of what they describe. Dist. Ct. Hearing Tr. 6/14/13, at 5-6. Yet the state took the view that the law "regulates conduct, not speech." Dist. Ct. Dkt. 27, at 36. The state elaborated: "It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it[.] . . . But § 518 does not dictate the *content* of that communication at all; sellers are free to set the credit card price at whatever level they wish." *Id.* at 37.

The district court was not persuaded. It held that the law "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." App. 73a. Under the law, the district court explained, "if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells

the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% 'swipe fee.' But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved." App. 56a. "[T]his virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment." *Id.*

The court noted that the state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" dual-pricing schemes, not pricing itself—"turns the speech-conduct distinction on its head." App. 73a. The court highlighted the flaw in the state's logic:

> [I]n defendants' view, setting prices (which section 518 does not regulate) is speech, but communicating those prices to consumers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.

App. 74a. The court then found that the law "cannot past muster" under the four-part *Central Hudson* test for commercial-speech restrictions, and had "little difficulty concluding" that it is too vague. App. 75a, 80a. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

C. After stipulating to a final judgment in the plaintiffs' favor, the state appealed and the Second Circuit reversed. It held that the law regulates "merely prices," not speech, and thus need not satisfy scrutiny. App. 21a.

The court began its analysis by dividing up the plaintiffs' challenge into two parts, based on a belief that they were "claiming First Amendment protection for two distinct kinds" of dual-pricing schemes. The first was the core of the plaintiffs' challenge—their preferred way of communicating their prices: a scheme in which the merchants "post only a single price" on the label for each product, while communicating the surcharge amount through a separate sign (*e.g.*, "3% credit-card surcharge"). App. 15a. The second was a scheme in which a merchant "posts two different prices" on the label for each product and "characterize[s] this price differential as a 'surcharge'" (or as costing "more"). App. 16a.

"As applied to single-sticker-price schemes," the court upheld the law as a regulation of conduct. App. 18a. The court determined that the merchant's decision of which price to frame as the "regular" price on the "sticker," and which to convey through a separate sign, was not itself "a communicative act." App. 25a. If it were, the court reasoned, that would "amount[] to the position" that "prices are themselves speech." App. 25a-26a.

Turning to the second part—whether the law unconstitutionally prohibits merchants from posting two different prices for each product and characterizing the difference as a credit "surcharge"—the court declined to "reach the merits" and instead chose to abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). App. 28a. Disregarding the law's enforcement history, the court concluded that "[i]t is far from clear that Section 518 prohibits the relevant conduct." App. 31a. The court also held that the law is not unconstitutionally vague "for essentially the same reasons" that it rejected the First Amendment challenges. App. 41a.

REASONS FOR GRANTING THE PETITION

I. The circuits are split over whether no-surcharge laws unconstitutionally restrict speech.

In the decision below, the Second Circuit held that New York's no-surcharge law regulates "merely prices" and thus "does not implicate the First Amendment." App. 20a-21a. Since then, two other circuits have addressed whether indistinguishable state laws violate the First Amendment. One answered yes, in "direct conflict" with the decision below. *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1257 (11th Cir. 2015) (Carnes, C.J., dissenting). The other answered no. Both produced dissents. The result is an acknowledged and deepening "circuit split" that only this Court can resolve. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016).

A. On one side of the split is the Eleventh Circuit, which declared Florida's virtually identical law "an unconstitutional abridgment of free speech." *Dana's R.R. Supply*, 807 F.3d at 1251. Unlike the Second Circuit, the Eleventh Circuit rejected the state's argument that the law regulates pricing, not speech. "After all," the court explained, "what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations," making the law "a restriction on speech, not a regulation of conduct." *Id.* at 1245.

Applying intermediate scrutiny, the Eleventh Circuit made "short shrift" of the law, finding that it "founders at every step." *Id.* at 1249. It "does not target false or misleading speech," the court explained, because "[c]alling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading

than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba." *Id.* The court "struggle[d] to identify a plausible governmental interest" served by the law, "much less one that could be considered substantial." *Id.* And even assuming such an interest existed, the law would "prove[] too broad and too blunt a means to its end." *Id.* at 1250. "By holding out *discounts* as more equal than *surcharges*," the court concluded, the law "overreaches to police speech well beyond the State's constitutionally prescribed bailiwick." *Id.* at 1251.

Chief Judge Carnes dissented, expressing his view that the statute should be read to prohibit only undisclosed surcharges (akin to a false-advertising law), to save it "from a fatal constitutional flaw" and "a great big First Amendment bullseye." *Dana's R.R. Supply*, 807 F.3d at 1252-53. He noted that, by rejecting that reading, the majority had created a "direct conflict with our sister circuit on this issue." *Id.* at 1257.

B. That conflict has since deepened. On the side opposite the Eleventh Circuit, the Second Circuit has now been joined by a divided Fifth Circuit panel, further entrenching the "circuit split." *Rowell*, 816 F.3d at 78.

Finding the Second Circuit's reasoning "persuasive"—and rejecting the Eleventh Circuit's reasoning as "unavailing"—the Fifth Circuit held that Texas's no-surcharge law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment." *Id.* at 80, 83. The majority acknowledged that Texas's law (like Florida's and New York's) allows a merchant to "dual-price as it wishes," so a merchant may achieve the "same ultimate economic result" whether expressed as a cash discount or credit-card surcharge. *Id.* at 81. Yet the majority thought that the Eleventh Circuit "overlook[ed]

differences in the economy activity" between surcharges and discounts. *Id.* at 83.

In dissent, Judge Dennis set forth his view that the law implicates the First Amendment because it "does not regulate the difference between [the cash and credit] prices," only how that difference is expressed. *Id.* at 86. "A merchant who describes the difference between these prices as a surcharge," Judge Dennis elaborated, "is not assessing 'additional' fees above a 'regular' price; he is only characterizing a perfectly legal price differential in a chosen way. If he violates the Anti–Surcharge Law it is because of the content of his speech, not because of the nature of his conduct." *Id.* at 85. Because the law "makes the legality of a price differential turn on the language used to describe it," Judge Dennis would have held that the law restricts "protected commercial speech" and "cannot survive" *Central Hudson* scrutiny. *Id.* at 86.[2]

C. This "growing circuit court split" has already led commentators to speculate that it "could prompt the U.S. Supreme Court to take up the issue." Ballard Spahr, *Fifth Circuit Rejects Constitutional Challenge to Texas "No Credit Card Surcharge" Law*, Consumer Fin. Servs. Grp. (Mar. 10, 2016), http://bit.ly/24vwupG; *see, e.g.*, Hudson, *Federal appeals courts split over law on credit card surcharges*, ABA Journal (Mar. 1, 2016), http://bit.ly/1QBC01x (observing that no-surcharge laws "have fared differently in federal appeals courts, setting the stage for possible future review by the U.S. Supreme

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[2] The Florida Attorney General has filed an application with Justice Thomas, requesting an extension of the time to file a petition for certiorari from the Eleventh Circuit's decision. *See Bondi v. Dann's R.R. Supply*, No. 15A1021. Justice Thomas granted the application, making the petition due on June 6. The plaintiffs in *Rowell* will also file a petition for certiorari, which is due on May 31.

Court"); Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1989 (2016) (discussing "the conflict between the Second and Eleventh Circuits"). That is especially true because the "conflicting cases" concern a fundamental constitutional question: they "illustrate the importance of the threshold determination of whether a regulation governs speech or conduct." Note, *Free Speech*, 129 Harv. L. Rev. at 1988.

Absent this Court's intervention, the split will only deepen. A California district court has declared that state's no-surcharge law unconstitutional, finding that it regulates only how "prices are conveyed to customers, not the prices themselves." *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015), *appeal pending* No. 15-15873 (9th Cir.). Although that decision is currently on appeal to the Ninth Circuit, that circuit can only take sides on the split; it cannot resolve the split. So there is no reason for the Court to await further percolation in the lower courts. Three circuits and four district courts have already issued opinions thoroughly grappling with the First Amendment issues presented here. And two of those opinions produced reasoned and thoughtful dissents. The time is ripe for this Court's review.

II. The question presented is one of exceptional national importance.

A growing circuit split is undesirable under any circumstances, but it is intolerable here given the need for national uniformity and the implications of the decision below.

A. The need for uniformity is undeniable. Thousands of merchants do business in different states (and across state lines) every day. That is why Congress long ago erected a national rule protecting the right of merchants to offer cash discounts. Now, after the recent landmark

$7.25 billion antitrust settlement with Visa and MasterCard, merchants are presented with the opportunity to truthfully convey the cost of credit as a surcharge. But because of the conflict, New York and Texas merchants—unlike those in Florida, California, and the 40 states without a no-surcharge law—cannot reap that benefit. And many merchants, like petitioner Patio.com, which has stores in both New York and Florida, are in a particularly difficult position. They can now communicate the cost of credit as a surcharge in some locations, but doing so in others could result in criminal liability.

All that is bad enough as it is. But, given the size and importance of the economies of New York and Texas, and the need for uniform pricing schemes, the reality is that national retailers are unlikely to use surcharging *at all*, even where it is permissible, as long as the split endures. This Court should grant certiorari to make clear that state no-surcharge laws violate the First Amendment, and thus ensure that merchants throughout the country operate under a single rule.

B. Even setting aside the need for uniformity, the question presented has enormous stakes for our economy. Because credit-card companies have been so successful in hiding the cost of credit from consumers, U.S. merchants pay some of the highest swipe fees in the world—around 3% of every credit-card purchase, or over $50 billion a year in fees. *See* 156 Cong. Rec. S4839 (June 10, 2010). This means that New York merchants alone pay several billion dollars in fees every year, which are passed on to customers in the form of higher prices. And these swipe fees have increased dramatically in recent years—even as they have decreased in countries that permit surcharges. Weiner & Wright, *Interchange Fees in Various Countries: Developments and Determinants*

14 (Fed. Reserve Bank, Working Paper 05-01, Sept. 6, 2005).

Allowing merchants to truthfully inform consumers of the cost of credit will not just lead to lower fees (and hence lower retail prices), but also reduce the "regressive transfer of income from low-income to high-income consumers." Schuh, *Who Gains and Who Loses from Credit Card Payments?*, at 2. Because no-surcharge laws bar merchants from communicating the cost of credit in the most effective way possible, most merchants instead simply increase sticker prices for all customers to recoup the cost of swipe fees. This creates a pervasive, "non-trivial" cross-subsidy: an annual "total transfer of $1,282 from the average cash payer to the average card payer." *Id.* at 3, 21. Rather than leave in place a circuit split that has the effect of prolonging an anticompetitive and regressive regime, this Court should grant certiorari and reverse the Second Circuit's decision.

III. This case presents an ideal vehicle to address the question presented.

This case is an ideal vehicle for resolving the circuit split and deciding whether state no-surcharge laws violate the First Amendment. There are no factual disputes. The case is not in an interlocutory posture. The state had an opportunity below to try to defend the law under *Central Hudson*. There is a robust record on enforcement of the statute—including declarations from merchants who were recently targeted by the Attorney General for violating the law (declarations that the state has not challenged)—so this Court need not speculate about how the law works on the ground. And although the Second Circuit abstained under *Pullman* from a subsidiary aspect of the plaintiffs' challenge, it directly addressed (and rejected) their core argument that New York's law unconstitutionally prevents them from ex-

pressing the cost of credit how they would like: as a "surcharge" (or "additional fee") on top of their "sticker" price.

That question—to which the circuits have given conflicting answers—is thus cleanly teed up by this petition. This Court should answer it.

IV. The decision below is wrongly decided under this Court's commercial-speech cases.

This Court has held that the First Amendment "requires heightened scrutiny" whenever the government creates restrictions that turn on the content of a speaker's words. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565-66 (2011). This scrutiny applies to any law whose "purpose and practical effect" are "to suppress speech" based on content, even if the law "on its face appear[s] neutral." *Id.*; *see McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (applying scrutiny "even though the Act says nothing about speech on its face"). Thus, "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986). If a law makes liability "depend[] on what [people] say," in other words, it "regulates speech on the basis of its content." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

"Commercial speech is no exception." *Sorrell*, 564 U.S. at 566. The Court has long held that this speech—including speech conveying "price information" to consumers—is "protected by the First Amendment." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770. So if a law's "purpose and practical effect" are to restrict price information or other commercial speech based on its content, then the law must withstand scrutiny. *Sorrell*, 564 U.S. at 565.

A. Without grappling with any of this authority, the Second Circuit concluded that New York's no-surcharge law "regulates conduct, not speech." App. 27a. But the law does not regulate *any* conduct: It does not regulate the amounts that merchants may charge for their goods, nor does it regulate the difference between the cash and credit prices. To the contrary, the law "targets expression alone." *Dana's R.R. Supply*, 807 F.3d at 1245.

The Second Circuit's own hypothetical proves the point. Here is what the court said:

> If a consumer thinks, based on a seller's sticker price, that she will be paying $100 for the seller's goods or services, then she will be annoyed if it turns out that she actually has to pay $103 simply because she has chosen to use a credit card; by contrast, if the sticker price is $103, she will be less annoyed by having to pay $103, even if cash customers only have to pay $100.

App. 23a. Although the Second Circuit drew from this hypothetical the conclusion that "[n]othing about the consumer's reaction in either situation turns on any words uttered by the seller," *id.*, that is mistaken. The consumer is "annoyed" in the first instance because she was misled by the sticker price (what the seller *said* the price was). As Judge Sutton has explained, something "cannot simultaneously be non-communicative" and "yet pose the risk of *communicating* a misleading message." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 510 (6th Cir. 2008). Even if the hypothetical seller said nothing aloud, the First Amendment protects more than just conversations. The way in which a merchant chooses to communicate price information to consumers—on stickers, signs, advertisements, and the like—is itself speech. *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

Misleading commercial speech can of course be regulated. But that is because it gets no First Amendment protection—not because it isn't speech. The petitioners, however, wish to communicate truthful, *non*-misleading information: They want to frame the cash price as the "sticker" price and the price difference as a "surcharge." That "is no more misleading than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba." *Dana's R.R. Supply*, 807 F.3d at 1249.

The enforcement history of New York's law confirms that it regulates speech. In the first reported prosecution under the statute, a gas-station owner was prosecuted and convicted because his cashier truthfully informed a customer that it cost "five cents 'extra'" to use credit rather than saying that it was a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1013. The state court set aside the conviction as constitutionally "intolerable," observing that the law "creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. And the state's continued enforcement efforts bear this out: The Attorney General's office recently told a heating-oil seller that, to comply with the law, he need not change the amounts he actually charges consumers, but must convey the difference between the cash and credit prices "as a cash 'discount,' not a credit 'surcharge.'" CA2 J.A. 154. The state even gave the seller "a script of what [he] could tell customers." *Id.*

These examples demonstrate that the no-surcharge law operates as a content-based speech restriction. As the Eleventh Circuit observed, "there is no real-world difference between the two formulations." *Dana's R.R. Supply*, 807 F.3d at 1245. The only difference is speech.

And regulating that speech was the law's purpose. It was enacted to fill the gap left by the federal ban's expi-

ration—a ban resulting from years of lobbying by credit-card companies who understood that the surcharge label "talk[s] against the credit industry." *Cash Discount Act, 1981: Hearings on S. 414*, at 32, 60. Like Congress, New York knew that credit surcharges and cash discounts, although "mathematically the same," are "very different" in terms of their "practical effect and impact . . . on consumers." S. Rep. No. 97-23, at 3 (1981). Indeed, the state justified the law based on the different psychological effects that the two words have on consumers' understanding and behavior: "Surcharges, *even if only psychologically*, impose penalties on purchasers . . . . A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." CA2 J.A. 114 (emphasis added).

The law affects consumer spending, in other words, "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. St. Bd. of Pharmacy*, 425 U.S. at 769. There is no doubt that this assumption is well placed in the credit-card context. *See* Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352. But states may not pass laws that seek to "diminish the effectiveness" of communication simply because they think certain speech is too powerful. *Sorrell*, 564 U.S. at 565. Courts must "be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Fear that "the public will respond 'irrationally' to the truth," *id.*, or "would make bad decisions if given truthful information," is no justification for banning speech, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Hence, states should "assume that . . . information is not in itself harmful, that people will perceive their own best interests if only they are well enough

informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

New York's no-surcharge law does just the opposite. It hides the true cost of credit from customers to prevent negative reactions by "consumers [who] dislike being charged extra." App. 23a. And it does so not because of paternalism, but to "give one side"—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978).

B. Because New York's law regulates speech, it must satisfy First Amendment scrutiny. This Court has traditionally subjected commercial-speech restrictions to intermediate scrutiny under the *Central Hudson* test, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not . . . misleading"; (2) "whether the asserted governmental interest" justifying the regulation "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the challenged law "is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

This Court should "easily conclude[]," App. 75a n.8, as Judge Rakoff did, that the law flunks every part of this test—and, indeed, that it "crumbles under *any level* of heightened First Amendment scrutiny," *Dana's R.R. Supply*, 807 F.3d at 1239 (emphasis added).

First, all parties agree that dual-pricing practices are lawful, and the district court found that surcharges "actually make consumers more informed rather than less" by "truthfully and effectively conveying the true costs of using credit cards." App. 76a. *Second*, the law does not "directly advance[]" any governmental interest; to the contrary, it "perpetuates consumer confusion by

preventing sellers from . . . educat[ing] consumers about the true costs of credit-card usage." App. 77a. And the law is "riddled with numerous 'exemptions and inconsistencies [that] bring into question the purpose' of the statute." *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). For one thing, the state exempts *itself* and "certain favored utilities" from the law's prohibition. *Id. Third*, the law "is far broader than necessary to serve any asserted antifraud purpose." App. 78a. As the district court observed, the state "easily could have limited its regulation to surcharges that are deceptive or misleading." *Id.* Or it could have enacted a law like those in Georgia or Minnesota, which permit surcharges so long as they are conspicuously disclosed. *See* Ga. Code § 13-1-15 (2015); Minn. Stat. § 325G.051(1)(a)(1) (2015).

The law's First Amendment deficiencies are exacerbated by its vagueness—that is, its failure "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and its encouragement of "arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Indeed, the district court (echoing the state court in *Fulvio*) had "little difficulty" concluding that the law is "impermissibly vague." App. 80a; *see Fulvio*, 517 N.Y.S.2d at 1012 (holding the law to be "so vague, uncertain and arbitrary of enforcement as to be fatally defective"). To see the law's vagueness, imagine that you are a merchant who offers dual pricing and decides to sell a product for $100 if the customer pays in cash and $102 if the customer pays with credit. How do you comply with the law? What can you say? As the court that struck down California's law asked: Can you list the price as "$100+2% surcharge"? *Italian Colors*, 99 F. Supp. 3d at 1211. "Does that scenario constitute an unlawful surcharge since the percentage is calculated at the cash register?" *Id.* What

if you listed the price as $100 but put up "large signs displayed throughout the establishment stating that a 2% surcharge will be applied for purchases made with credit cards?" *Id.* And what if one of your customers calls and asks for your prices? What do you tell them?

As a result of the law's uncertainty, the petitioners have been forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," thus making the law's speech restriction even worse. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (quotation marks and ellipsis omitted).

C. Rather than see the law's vagueness as another sign of its unconstitutionality, the Second Circuit compounded its errors by wrongly invoking *Pullman* abstention. After addressing the core of the plaintiffs' challenge—whether they can convey the cash price as the "regular" sticker price, and the credit-card price as an "additional" fee (or "surcharge") on a separate sign—the court determined that a secondary aspect of their challenge "turns on an unsettled question of state law." App. 28a. Specifically, the court abstained as to whether the law may be constitutionally applied to a merchant who, like the gas-station owner in *Fulvio*, "posts two different prices" on each product and "characterize[s] this price differential as a 'surcharge'" (or as costing "more"). App. 15a-16a.

But this Court has repeatedly emphasized that "the abstention doctrine is inappropriate for cases" in which "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965); *see City of Houston v. Hill*, 482 U.S. 451, 467 (1987); *Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). "[A] federal court's 'obligation' to hear and

decide" cases within its jurisdiction "is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (internal quotation marks omitted). And that principle has "particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

That is because, as this Court long ago explained, abstaining in a First Amendment challenge may "well result in the denial of any effective safeguards against the loss of protected freedoms of expression," which "cannot be justified." *Dombrowski*, 380 U.S. at 492. Put differently, "forc[ing] the plaintiff who has commenced a federal action to suffer the delay of state court proceedings" in a First Amendment challenge "might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252. That is why the Ninth Circuit has adopted effectively a categorical "rule that federal courts should not invoke *Pullman* abstention in cases implicating First Amendment rights." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014); *see, e.g.*, *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010); *Porter v. Jones*, 319 F.3d 483, 491-94 (9th Cir. 2003); *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989).

The Second Circuit's endorsement of *Pullman* cannot be reconciled with these precedents, and is further proof that the court failed to safeguard the petitioners' First Amendment rights. The court dismissed out of hand any possibility that those rights will be chilled by forcing the petitioners to litigate part of their claims in state court. App. 40a. It even suggested that federal courts can be "an unwise choice of forum" for such challenges, *id.*—a statement that misunderstands that First Amendment rights are "*always* an area of particular

federal concern," *Ripplinger*, 868 F.2d at 1048 (emphasis added). This Court should intervene to protect them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 12, 2016

APPENDIX

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APPENDIX A

United States Court of Appeals,
Second Circuit

Nos. 13–4533, 13–4537

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs– Appellees,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County,
Defendants–Appellants.

December 11, 2015

Appeals from the United States District Court for the Southern District of New York

Before: WESLEY, LIVINGSTON, and CARNEY, *Circuit Judges*.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

New York General Business Law § 518 ("Section 518") provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Plaintiffs–Appellees in this action ("Plaintiffs") are five New York businesses and their owners and managers.[1] They sued the Attorney General of the State of New York and the District Attorneys of New York County and Kings County (collectively, "New York") in the United States District Court for the Southern District of New York, claiming that Section 518 violates the First Amendment's Free Speech Clause and is void for vagueness under the Fourteenth Amendment's Due Process Clause. The district court (Jed S. Rakoff, *Judge*) agreed with Plaintiffs on both counts, and eventually entered a final judgment declaring Section 518 unconstitutional and permanently enjoining New York from enforcing the law against Plaintiffs. On appeal, we conclude that the application of Section 518's text to surcharges added to single sticker prices violates neither the First Amendment nor the Due Process Clause. We further decline to address other applications, invoking

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[1] Plaintiffs are Expressions Hair Design, a unisex hair salon in Vestal, New York, and its co-owner, Linda Fiacco; The Brooklyn Farmacy & Soda Fountain, Inc., an ice-cream parlor in Brooklyn, and its co-founder, Peter Freeman; Bunda Starr Corp., which owns a Manhattan liquor store, and its president, Donna Pabst; Five Points Academy, a Manhattan martial arts studio, and its vice president, Steve Milles; and Patio.Com LLC, an outdoor furniture and billiards company with stores throughout New York, and its founder and president, David Ross.

Pullman abstention. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). We therefore vacate the judgment entered by the district court and remand for dismissal of Plaintiffs' claims.

BACKGROUND

A. "Swipe Fees" and Credit-Card Surcharges

Every time a consumer pays for goods or services with a credit card, the credit-card issuer charges the merchant a percentage of the purchase price. (The parties and literature refer to these fees as "swipe fees" or "merchant-discount fees.") The typical fee is two to three percent of the transaction amount. Plaintiffs and other businesses that chafe at these fees would like to pass them along to consumers while also making consumers aware of the charge in an effort to convince them to pay cash. Accordingly, they would like to charge more than their regular price to customers who use credit cards; that is, they would like to impose a "surcharge" on credit-card users. Another way of passing the cost of credit along to customers is to offer a discount from the regular price to customers who use cash. While these two means of passing along the cost of credit may seem equivalent (in that they both ultimately result in credit-card customers paying more than cash customers), differences between them have led to a series of efforts by both credit-card companies and legislators to prohibit credit-card surcharges specifically.

One difference between credit-card surcharges and cash discounts involves consumers' reactions to them. A psychological phenomenon known as "loss aversion" means that "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). For this reason,

credit-card surcharges are more effective than cash discounts at discouraging credit-card use among consumers, which has naturally led credit-card companies to oppose them. *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 45 (1980). But some consumer advocates and lawmakers, too, have favored protecting consumers from the inconvenience and annoyance of having extra charges added to their bills, and have also suggested that discouraging credit-card use may have adverse economic effects on the broader economy by "dampen[ing] retail sales." J.A. 114.

According to proponents of prohibitions on credit-card surcharges, experience also suggests that such surcharges will tend to exceed the amount necessary for the seller to recoup its swipe fees, meaning that sellers will effectively be able to extract windfall profits from credit-card users.[2] By contrast, cash discounts are unlikely to lead to the same problem, because merchants will not set the amount of the discount higher than the marginal cost of credit. *See, e.g.*, Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1352 (2008) ("[M]erchants' ability to discount is limited by the spread between the credit price and the merchandise cost to the merchant. If the merchant offers discounts by more than that spread, the merchant will lose money on the transaction. Merchants might need to increase the credit price to create a sufficient spread to profitably offer a discount that affects consumer behavior."). Further, because credit-card surcharges (unlike cash discounts)

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[2] When credit-card surcharges were legalized in Australia, for example, they rose to about twice the amount that sellers actually had to pay in swipe fees, despite predictions that competition among sellers would prevent this from happening.

offer a means of increasing customers' bills, dishonest sellers may attempt to profit at their customers' expense by imposing surcharges surreptitiously at the point of sale.

B. The Lapsed Federal Ban on Credit-Card Surcharges

New York enacted Section 518 in 1984. Because the law's enactment was motivated by the expiration of a federal law that prohibited credit-card surcharges, we briefly recount the history of that federal law.

In the early days of credit cards, credit-card issuers' contracts with merchants prohibited merchants from charging different amounts to customers who used credit cards and those who used other methods of payment. In 1974, however, Congress amended the federal Truth in Lending Act ("TILA") to protect merchants' ability to offer their customers discounts for using cash. *See* Fair Credit Billing Act § 167, Pub. L. No. 93–495, tit. III, 88 Stat. 1500 (1974) (codified in relevant part at 15 U.S.C. § 1666f(a)) (providing that issuers could not "prohibit ... seller[s] from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card"). In the same amendments, Congress also provided that these protected cash discounts did not rank as "finance charges" governed by TILA's disclosure requirements. *Id.* In 1975, the Federal Reserve Board (the "Fed") promulgated a regulation clarifying that the statutory exemption from TILA's disclosure requirements did not also apply to credit-card surcharges. *See Fair Credit Billing, Description of Transactions*, 40 Fed. Reg. 43,200, 43,203 (Sept. 19, 1975). In 1976, Congress again amended TILA to both ratify the Fed's interpretation and ban credit-card surcharges entirely. *See* An Act to Extend the State Taxation of Depositories Act, Pub. L.

No. 94–222, 90 Stat. 197 (1976) (the "1976 Amendments"). Specifically, the 1976 Amendments provided: "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." *Id.* § 3(c)(1). Moreover, to clarify the distinction between protected discounts and newly unlawful surcharges, the 1976 Amendments defined the term "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means"; defined the term "discount" as "a reduction made from the regular price"; and clarified that a discount "shall not mean a surcharge."[3] *Id.* § 3(a) (codified in relevant part at 15 U.S.C. § 1602(q), (r)).

The 1976 Amendments' ban on credit-card surcharges was initially set to expire in 1979, but in 1978, Congress extended it until 1981. *See* Financial Institutions Regulatory & Interest Rate Control Act § 1501, Pub.L. No. 95–630, 92 Stat. 3641 (1978). In 1981, Congress extended the statute again, and—apparently in response to the charge that the distinction between credit-card surcharges and cash discounts remained difficult to understand—further clarified the matter by defining the term "regular price" as follows:

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[3] In the hearings leading up to the enactment of the 1976 Amendments, at least one congressman expressed disbelief that this clarification was needed, opining that the distinction between cash discounts and credit-card surcharges ought to be obvious. *See A Bill to Amend the Fair Credit Billing Act (Public Law 93–495) with Respect to the Use of Cash Discounts, and for Other Purposes: Hearing on H.R. 10209 before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Currency, and Housing*, 94th Cong. 96 (1975) (Statement of Congressman Wylie) ("[T]o say that the word 'surcharge' and the word 'discount' are synonymous, makes us all look like fools in my judgment.").

> the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of [a credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of [a credit card] and the other when payment is made by use of cash, check, or similar means.

Cash Discount Act § 102, Pub. L. No. 97–25, 95 Stat. 144 (1981) (codified in relevant part at 15 U.S.C. § 1602(y)).

The 1981 enactment provided that the ban on credit-card surcharges would expire on February 27, 1984. *Id.* § 201. The ban expired on that date, and Congress did not renew it. The federal ban's expiration motivated eleven states to enact their own laws prohibiting credit-card surcharges. New York was one of those states.

C. Section 518's Enactment

Section 518, in its entirety, reads as follows:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.
>
> Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

N.Y. Gen. Bus. Law § 518.[4] Thus, Section 518's operative language is essentially identical to that of the lapsed

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[4] A "seller" is defined as "any person who honors credit cards or debit cards which may be used to purchase or lease property or services." N.Y. Gen. Bus. Law § 511.6.

federal surcharge ban, but it does not incorporate its federal counterpart's explicit definitions of "surcharge," "discount," and "regular price." 15 U.S.C. § 1602(q), (r), (y).

When the bill proposing Section 518 was introduced in the New York legislature, the bill summary indicated that the law was necessary to take the place of the lapsed federal surcharge ban. It cited the risk that merchants would, "at the time of the sale, raise or lower the price according to the method of payment," leaving the "consumer ... subject to dubious marketing practices and variable purchase prices." It also clarified, however, that "merchant[s] would be able to offer a discount for cash if they so desire." J.A. 109.

Advocacy groups were divided on the proposed bill. It was supported by the New York State Consumer Protection Board, which explained that surcharges "psychologically ... impose penalties on purchasers and may actually dampen retail sales," and also expressed the fear that permitting credit-card surcharges would undermine efforts to "insure that customers can depend on advertised claims and prices ... by permitting unannounced price increases at the point of sale." J.A. 114. However, the Retail Council of New York State opposed the bill, arguing that swipe fees required merchants to increase their prices, and that in the absence of surcharges, price increases would be spread across all customers, resulting in cash purchasers' effectively subsidizing credit-card users' purchases. Ultimately, the New York Senate passed Section 518 by a vote of fifty-two to seven, and the Assembly passed it unanimously.

D. Section 518's Enforcement History

Although New York's statutory ban on credit-card surcharges has been in effect for several decades, it was,

for much of that time, effectively redundant with standard provisions in credit-card issuers' contracts that prohibited sellers from imposing credit-card surcharges on customers (although, as previously noted, TILA guarantees sellers' freedom to offer cash discounts).[5] As a result, there are almost no reported cases involving Section 518's application.

The parties have cited just one reported prosecution under Section 518. In 1986, Eugene Fulvio, a gas-station owner, was charged with an attempted violation of the statute. Initially, a New York trial court rejected Fulvio's motion to dismiss on the ground that Section 518 was unconstitutionally vague on its face. *See People v. Fulvio*, 514 N.Y.S.2d 594, 597 (Crim. Ct. 1987) ("*Fulvio I*") (holding that Section 518 by its terms "gave the defendant fair warning as to what conduct was prohibited"). After a subsequent bench trial, however, a different trial-court judge granted Fulvio's renewed motion to dismiss on the ground that Section 518 was void for vagueness as applied to him. *See People v. Fulvio*, 517 N.Y.S.2d 1008, 1015 (Crim. Ct. 1987) ("*Fulvio II*") (finding the law unconstitutional because "it is not the *act* which is outlawed, but the *word* given that act"). Despite distinguishing *Fulvio I* on the ground that it had involved a facial as opposed to an as-applied challenge, the court in *Fulvio II* did not actually resolve a factual dispute as to whether Fulvio had posted separate cash and credit-card prices at his gas station (as

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[5] In the last decade, sellers began challenging these provisions in various antitrust lawsuits, which culminated in a nationwide class-action settlement pursuant to which Visa and MasterCard agreed to drop their contractual prohibitions on credit surcharges. *See In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (approving this settlement).

Fulvio had testified at trial), or instead posted a single price and then imposed a surcharge for credit-card use (as the complainant had testified). *See id.* at 1011–12.

In addition to the *Fulvio* prosecution, Plaintiffs point to another, more recent spate of enforcement activity involving Section 518. In 2009, the New York State Attorney General's office announced that it had reached settlements with fourteen heating-oil sellers in Suffolk County who had been violating Section 518. According to affidavits submitted by some of those sellers in this case, the sellers had communicated with their customers over the phone: the sellers "would tell [customers] the price of fuel (for example, $3.45/gallon) and then explain that there was a surcharge on top of that price for paying with a credit card (for example, $.05/gallon)." J.A. 153. The Attorney General's office told the sellers that these communications were illegal under Section 518, but that the sellers "could quote the price as $3.50/gallon ... and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash." J.A. 154.

E. Procedural History

Plaintiffs filed this action against New York in the Southern District of New York on June 4, 2013. Their July 15, 2013 amended complaint contains three claims (all brought pursuant to 42 U.S.C. § 1983), which allege, respectively, that Section 518 violates the First Amendment's free-speech guarantee, is void for vagueness under the Due Process Clause of the Fourteenth Amendment, and is preempted by the Sherman Antitrust Act. Plaintiffs sought a declaration that Section 518 is both unconstitutional and preempted, as well as an injunction against its enforcement.

In their amended complaint, Plaintiffs allege that they would like to charge credit-card customers more than cash customers to account for the credit-card

companies' swipe fees. Specifically, they would like to impose a credit-card surcharge, as opposed to offering a cash discount. According to the amended complaint, only one Plaintiff currently charges different amounts for credit and cash purchases: Expressions Hair Design, a unisex hair salon in Vestal, New York, alleges that its current policy is to charge two different prices, one for credit-card customers and one for cash customers. However, it claims to fear that describing this difference as a "surcharge," or "say[ing] that credit is 'extra' or 'more,'" might violate Section 518. J.A. 58.

On June 17, 2013, Plaintiffs moved for a preliminary injunction preventing Defendants from enforcing Section 518 against them, and New York moved to dismiss on ripeness and standing grounds, as well as for failure to state a claim. In supplemental affidavits submitted along with their motion, two Plaintiffs—Stephen Milles, the vice president of Five Points Academy, and Linda Fiacco, the co-owner of Expressions Hair Design—clarify the pricing schemes that they would like to use but which are (or may be) prohibited by Section 518. Milles avers that Five Points would like to impose "an extra charge, or 'surcharge,'" for credit-card users and to "display prominently the surcharge that the customer will incur." J.A. 149. According to Milles, "[i]t is not our intention to display two separate prices for each good and service that we offer, but rather to display—with roughly equal prominence—a single set of prices and the credit card surcharge amount." J.A. 149. Along similar lines, Fiacco avers that Expressions Hair Design would like to charge credit-card customers three percent more than cash customers, and to display a sign that "characterize[s] the price difference as a 3% credit-card surcharge on top of the listed cash price" without "displaying the total credit-card price as a dollar figure." J.A. 151.

On October 3, 2013, the district court issued an opinion granting Plaintiffs' preliminary injunction motion and denying New York's motion to dismiss. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013). The district court found that Plaintiffs' challenge was ripe because they were presently chilled from implementing their preferred pricing scheme, and that Plaintiffs had standing based on a credible fear that Section 518 would be enforced against them. As for the First Amendment, the district court concluded that Section 518 burdens speech by "draw[ing] the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Id.* at 444. Applying the *Central Hudson* test for non-disclosure restrictions on commercial speech, the district court found Section 518 unconstitutional. *See id.* at 447. The district court also held that Section 518 was void for vagueness because it "turns on the labels that sellers use to describe their prices." *Id.* at 448. The court further held that Plaintiffs had demonstrated the other elements necessary for a preliminary injunction, and therefore "preliminarily enjoin[ed] the defendants from enforcing section 518 ... during the pendency of this case." *Id.* at 450. (The district court also denied New York's motion to dismiss Plaintiffs' preemption claim, though Plaintiffs had not sought a preliminary injunction on that ground.)

The parties stipulated to—and the district court entered, on November 4, 2013—a final judgment on Plaintiffs' First and Fourteenth Amendment claims, even though their preemption claim was still pending. *See* Fed. R. Civ. P. 54(b) ("[T]he court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."). In the final judgment, the district court (1) "declare[d] that [Section

518] violates the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment," (2) "permanently enjoin[ed] the defendants from enforcing [Section 518] against the plaintiffs," and (3) dismissed Plaintiffs' preemption claim as moot, without prejudice. J.A. 213.

This appeal followed.

DISCUSSION

"When reviewing an order granting either a preliminary or a permanent injunction, we review the district court's legal holdings de novo and its ultimate decision for abuse of discretion." *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014). Because we conclude that the district court erred in holding that Section 518 violates the First Amendment and the Due Process Clause, we vacate the judgment entered below and remand for dismissal. We begin with the First Amendment.

I.

A.

Some preliminary discussion is necessary to frame more precisely the scope of Plaintiffs' First Amendment challenge. Again, the statute provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. Because the statute does not define the word "surcharge," we give it its ordinary meaning. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). A "surcharge" ordinarily means "a charge in excess of the usual or normal amount: an additional tax, cost, or impost." *Webster's Third New International Dictionary* 2299 (2002); *see also Black's Law Dictionary* 1579 (9th ed.

2009) (defining "surcharge" as "[a]n additional tax, charge, or cost"); *Duprey v. State of Conn., Dep't of Motor Vehicles*, 28 F. Supp. 2d 702, 707 (D. Conn. 1998) (explaining that "a fee is a surcharge if it is in excess of a usual or normal amount"). Accordingly, Section 518's use of the word "surcharge" assumes that a seller to which the statute applies will have a "usual or normal" price that serves as a baseline for determining whether credit-card customers are charged an "additional" amount that cash customers are not.

The parties agree that this baseline is not the ultimate price that the seller charges to cash customers, but rather is something different—namely, the seller's "regular" price. Importantly, then, Section 518 does not prohibit all differentials between the price ultimately charged to cash customers and the price ultimately charged to credit-card customers; it forbids charging credit-card customers an additional amount *above* the regular price that is not also charged to cash customers, but it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers. (That is, it allows what we have termed "cash discounts.") To illustrate, if a seller's regular price is $100, it may not charge credit card customers $103 and cash customers $100, but if the seller's regular price is $103, it *may* charge credit-card customers $103 and cash customers $100. This distinction is consistent with the federal surcharge ban on which Section 518 was modeled, which (1) defined "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash," (2) defined "discount" as "a reduction made from the regular price," and (3) clarified that a discount "shall not mean a surcharge." 15 U.S.C. § 1602(q), (r).

If a surcharge means an additional amount above the seller's regular price, then it is basically self-evident how

Section 518 applies to sellers who post single, readily ascertainable prices for their goods or services (or what we will call "sticker prices"): the sticker price is the "regular" price, so sellers may not charge credit-card customers an additional amount above the sticker price that is not also charged to cash customers. As Plaintiffs point out, however, not all sellers post single sticker prices for their goods or services. The federal surcharge ban was eventually revised to account for this possibility by defining the term "regular price" so that the statute could never be violated unless the seller "tagged or posted" a single price. *See* 15 U.S.C. § 1602(y) (defining "regular price," in relevant part, as "the price charged ... when payment is made by [credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by [credit card] and the other when payment is made by use of cash, check, or similar means"). Section 518, by contrast, does not explicitly use the term "regular price," much less define it, nor does the law otherwise indicate whether or how it applies outside the single-sticker-price context. This difference between Section 518 and the lapsed federal surcharge ban raises certain questions about the former law's scope: Can a seller have a "regular" price if it does not post a single sticker price? If so, what is it?

With this background in mind, we turn to Plaintiffs' challenge to Section 518. Plaintiffs' submissions reveal that they are claiming First Amendment protection for two distinct kinds of pricing schemes. First, Plaintiffs aver that they would like to post only a single price for their goods and services and charge more than that price to credit-card customers, but are prohibited from doing so by Section 518. *See, e.g.*, J.A. 149 (Five Points Academy: "It is not our intention to display two separate prices for each good and service that we offer, but rather

to display—with roughly equal prominence—a single set of prices and the credit card surcharge amount."); J.A. 151 (Expressions Hair Design: "We would like to ... characterize the price difference as a 3% credit-card surcharge on top of the listed cash price."). In other words, Plaintiffs are seeking First Amendment protection for the kind of straightforward single-sticker-price scheme that Section 518 clearly prohibits. Second, Expressions Hair Design (the only Plaintiff to do so) currently posts two different prices for its services—one for credit-card customers and one for cash customers—and fears being prosecuted for characterizing this price differential as a "surcharge," or for telling its customers that credit costs "more." J.A. 56–58. (We will refer to this second pricing scheme as a "dual-price" scheme.)

Throughout the course of this litigation, Plaintiffs have attempted to demonstrate Section 518's unconstitutionality by reference to other, hypothetical pricing schemes that they neither currently employ at their businesses nor claim they would employ but for Section 518. Assessing a statute's constitutionality as applied to hypothetical situations not before the court, however, is appropriate only if the challenger is mounting a facial attack on the statute. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (explaining that "[f]acial challenges are disfavored" in part because they "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring))). Two kinds of facial challenges are generally available in the First Amendment context: a plaintiff can attempt to

demonstrate either (1) "that the law is unconstitutional in all of its applications," or (2) that "a 'substantial number' of its applications are unconstitutional 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 449 & n. 6 (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)). *But see Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989) (noting that overbreadth challenges are normally not available in the context of commercial speech). In either case, where (as here) the plaintiff delineates the specific conduct for which it is claiming protection, assessing the challenged statute's constitutionality as applied to that conduct is a critical first step. If that analysis shows that the plaintiff's own conduct may lawfully be prohibited, then the statute is not "unconstitutional in all of its applications." Even in an overbreadth challenge, moreover, the Supreme Court has told courts not to consider whether a statute is substantially overbroad "before it is determined that the statute would be valid as applied." *Fox*, 492 U.S. at 484–85.

Plaintiffs do not clarify in their briefing whether they are, in fact, mounting a facial attack on Section 518.[6] At

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[6] In discussing facial and as-applied challenges, we recognize that these categories are simply useful analytical tools, as opposed to necessary elements of a plaintiff's claim. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 331 (2010). In all cases, a federal court is limited to determining the rights and obligations of the parties before it; whether a law is invalidated "on its face" or merely "as applied" therefore depends on whether or not the reasoning used to invalidate the law in the particular case before the court would apply equally in any challenge to the same law. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2457–58 (2015) (Scalia, J., dissenting); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339–40 (2000). In this case, we think the distinctions between facial and as-applied challenges are quite important analytically for the reasons given in the text.

oral argument, they suggested that their challenge is exclusively as-applied, but that characterization is in significant tension with their general failure to focus narrowly on the actual conduct in which they are engaged or would like to be engaged. Ultimately, however, any uncertainty regarding the scope of Plaintiffs' First Amendment challenge does not meaningfully affect our analysis. For the reasons set forth below, we conclude that Section 518 does not violate the First Amendment as applied to single-sticker-price sellers. We further conclude that any challenge premised on Section 518's application outside the single-sticker-price context (whether facial or as-applied) necessarily fails because Section 518 is "readily susceptible" to a construction under which its application is limited to that context. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). The district court therefore erred in holding that Section 518 violates the First Amendment.

B.

As applied to single-sticker-price schemes like the ones described in Plaintiffs' submissions, Section 518 does not violate the First Amendment. Restrictions on commercial speech are traditionally analyzed under the four-factor test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Plaintiffs argue, and the district court held, that Section 518 burdens commercial speech and does not survive *Central Hudson*. *See Expressions Hair Design*, 975 F. Supp. 2d at 444, 447. On appeal, New York argues that Section 518 regulates conduct, not speech; in the alternative, it maintains that the law survives *Central Hudson*.[7] Because we agree

[7] New York argues further that if we conclude that Section 518 does not regulate speech, we could uphold it under the test

with New York that Section 518 does not regulate speech as applied to single-sticker-price sellers, we do not reach the parties' arguments under *Central Hudson*.

We start from the premise—conceded by Plaintiffs—that prices, although necessarily communicated through language, do not rank as "speech" within the meaning of the First Amendment. This principle is illustrated most vividly by the fact that price-control laws, which necessarily prevent sellers from communicating certain (illegal) prices, have never been thought to implicate the First Amendment. *See, e.g., Munn v. Illinois*, 94 U.S. (4 Otto) 113, 125 (1876) ("[It] has been customary ... in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, & c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."). Accordingly, although the Supreme Court has now repeatedly held that the advertising of *lawful* prices is protected by the First Amendment, *see, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–08 (1996) (plurality opinion); *Va. State Bd. of Pharmacy v. Va. Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761–70 (1976), it has reaffirmed in doing so that states may continue to make certain prices unlawful through "direct regulation," *44 Liquormart*, 517 U.S. at 507 (plurality opinion); *accord id.* at 524 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 530 (O'Connor, J., concurring in the judgment); *see Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731

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applicable to restrictions on expressive conduct. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). As explained in the text, we agree that Section 518 does not regulate speech, but because Plaintiffs have not argued that the law fails *O'Brien* scrutiny, we do not consider that possibility.

F.3d 71, 77 (1st Cir. 2013) ("In *44 Liquormart, Inc. v. Rhode Island*, a majority of the Justices, in striking down the categorical ban on liquor price advertising there, made clear that price regulations and other forms of direct economic regulation do not implicate First Amendment concerns." (citation omitted)).

If prohibiting certain prices does not implicate the First Amendment, it follows that prohibiting certain relationships between prices also does not implicate the First Amendment. Indeed, Plaintiffs readily concede that New York could simply prohibit sellers from charging different amounts for credit-card and cash purchases altogether without thereby "trigger[ing] First Amendment scrutiny." Appellees' Br. at 36. The problem with Section 518, in Plaintiffs' view, lies in the undisputed fact that the statute forbids credit-card surcharges while simultaneously permitting cash discounts. Because both credit-card surcharges and cash discounts ultimately amount to equivalent differences between the price charged to credit-card customers and the price charged to cash customers, Plaintiffs argue that (in the district court's words) Section 518 burdens protected expression by "draw[ing] the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Expressions Hair Design*, 975 F. Supp. 2d at 444. We disagree.

By its terms, Section 518 does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges; it simply prohibits imposing credit-card surcharges. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (explaining that a statute regulates "conduct, not speech," when it affects what regulated entities "must *do*," not "what they may or may not *say*"). Whether a

seller is imposing a credit-card surcharge—in other words, whether it is doing what the statute, by its plain terms, prohibits—can be determined wholly without reference to the words that the seller uses to describe its pricing scheme. If the seller is charging credit-card customers an additional amount above its sticker price that it is not charging to cash customers, then the seller is imposing a forbidden credit-card surcharge. The only "words and labels" on which the operation of the statute thus depends are (1) the seller's sticker price and (2) the price the seller charges to credit card customers. But these two "words and labels" are merely prices. And, as we have explained and as Plaintiffs themselves recognize, prices (though necessarily communicated through language) are not "speech" within the meaning of the First Amendment, nor are they transformed into "speech" when considered in relation to one another. Because all that Section 518 prohibits is a specific relationship between two prices, it does not regulate speech.

Plaintiffs' chief error—or, perhaps more accurately, the central flaw in their argument—is their bewildering persistence in equating the actual imposition of a credit-card surcharge (i.e., a seller's choice to charge an additional amount above the sticker price to its credit-card customers) with the words that speakers of English have chosen to describe that pricing scheme (i.e., the term "credit-card surcharge"). This is the only way to make sense of Plaintiffs' argument that "[w]hat [Section 518] regulates—all that it regulates—is what merchants may say: Characterizing the price difference as a cash 'discount' is favored; characterizing it as a credit 'surcharge' is a crime." Appellees' Br. at 27. But Plaintiffs are simply wrong. What Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price

that it charges to credit-card customers. A seller imposing a surcharge (an additional amount above its sticker price) on credit-card customers could choose to "characterize" that additional charge as whatever it wants, but that would not change the fact that it would be violating Section 518. Conversely, a seller offering a discount (a reduction from its sticker price) to cash customers could choose to "characterize" that reduction as whatever it wants (including as a "credit-card surcharge"), but that would not change the fact that the seller would *not* be violating Section 518. Of course, it is more likely that if a seller is imposing a credit-card surcharge, it will refer to its pricing scheme by its ordinary label—"credit-card surcharge"—while a seller offering a cash discount is likely to refer to its pricing scheme as a "cash discount." But the fact that these pricing schemes *have* different labels (and thus that sellers are likely to refer to them using different words) obviously does not mean that *all they are* is labels.

In Plaintiffs' view, credit-card surcharges and cash discounts must just be labels because consumers react differently to them: they react more negatively to credit-card surcharges than they react to cash discounts. Thus, Plaintiffs argue, New York has violated the First Amendment by banning a label it disfavors ("credit-card surcharge") while permitting a label it approves ("cash discount"). This argument, however, plainly begs the question: it assumes (incorrectly) that what New York has regulated are, in fact, labels. It is true, of course, that the government generally may not enact speech restrictions favoring one message over another. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to

serve compelling state interests."). But that well-established First Amendment principle is of no relevance whatsoever with respect to the threshold question whether the restriction at issue regulates speech or, instead, conduct.[8] In other words, as New York astutely observes, "[s]peech is not the only cause of consumer unhappiness; the mere fact that consumers react negatively to surcharges thus does not prove that surcharges are speech." Appellants' Reply Br. at 15.

In fact, consumers react negatively to credit-card surcharges not because surcharges "communicate" any particular "message," but because consumers dislike being charged extra. *See* Kahneman et al., *supra*, at 199 ("[C]hanges that make things worse (losses) loom larger than improvements or gains."). If a consumer thinks, based on a seller's sticker price, that she will be paying $100 for the seller's goods or services, then she will be annoyed if it turns out that she actually has to pay $103 simply because she has chosen to use a credit card; by contrast, if the sticker price is $103, she will be less annoyed by having to pay $103, even if cash customers only have to pay $100. Nothing about the consumer's reaction in either situation turns on any words uttered by the seller. And although the difference in the consumer's reaction to the two pricing schemes may be puzzling purely as an economic matter, we are aware of no authority suggesting that the First Amendment prevents states from protecting consumers against irrational psychological annoyances.

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[8] Plaintiffs' argument that Section 518 is "speaker-based," because it applies only to "sellers," is similarly circular. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011) (applying heightened First Amendment scrutiny to statute that "burdens disfavored *speech* by disfavored *speakers* ") (emphasis added).

Although the First Amendment generally prevents the government from justifying a *speech* restriction by reference to the harmful reactions that the speech in question will cause among the reading or listening public, *see, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) ("We have ... rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."), there is nothing controversial about the government's banning certain *prices* because of how consumers will react to them. The Supreme Court has said, for example, that states may enact price-control laws for the express purpose of suppressing consumer demand. *See 44 Liquormart*, 517 U.S. at 507 (plurality opinion) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance ... [H]igher prices can be maintained either by direct regulation or by increased taxation."). Accordingly, in *National Association of Tobacco Outlets v. City of Providence*, the First Circuit held that the City of Providence, Rhode Island could, consistent with the First Amendment, prohibit discounts for tobacco products based on evidence that such discounts would lead "to higher rates of tobacco use among young people." 731 F.3d at 76 (quoting U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 527–29 (2012)). Similarly, here, New York enacted Section 518 in part to prevent negative consumer reactions to credit-card surcharges—in effect, spurring

demand for credit-card use, instead of suppressing it. The First Amendment poses no obstacle to such a law.[9]

Plaintiffs' argument that Section 518 regulates how sellers "communicate" with their customers might also be understood as an argument that Section 518 regulates speech merely by forbidding sellers from setting their sticker prices lower than the prices that they ultimately charge to credit-card customers—in other words, that where a seller chooses to set its sticker price is a communicative act. Thus, if a seller wants to charge credit-card customers $103 and cash customers $100 in order to pass along the credit-card companies' swipe fees, the seller could (if Section 518 were no obstacle) either set its sticker price at $100 and thereby "communicate" a credit-card surcharge or, presumably just as easily, set its sticker price at $103 and thereby "communicate" a cash discount. This variation on Plaintiffs' argument, however, amounts to the position—which we have already rejected and which Plaintiffs

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[9] The subtext of Plaintiffs' argument that it is impermissible to regulate based on consumer reactions is their view that Section 518 was passed at the behest of the credit-card lobby to encourage consumers to use credit cards as opposed to cash. Even assuming that credit-card companies favored the law for that reason, however, the New York legislature identified a number of public-regarding rationales for the law's enactment. Moreover, a panel of this Court has recently expressed the view (that we need not address) that even unadulterated "economic favoritism" is a sufficiently rational basis to justify a state law regulating economic activity. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285–86 (2d Cir. 2015). Yet more pertinently here, Plaintiffs do not raise a rational-basis challenge to Section 518. Regardless of why New York wanted to prevent consumers from reacting negatively to credit-card surcharges, the *First Amendment* does not prohibit regulating on that basis where the object of the regulation is conduct, not speech. The wisdom of the policy choices animating Section 518 is not for us to judge.

concede is incorrect—that prices are themselves speech. The fact that sellers can move their sticker prices up and down with relative ease (and thus that sticker prices are, at least in some sense, not dictated by "economic realities") does not alter the fact that sticker prices, like any other prices, can be regulated without bringing the First Amendment into play.

In concluding that sticker prices are not constitutionally exceptional, we again draw support from the First Circuit's decision in *National Association of Tobacco Outlets*, which is both closely on-point and persuasive. There, the First Circuit rejected a First Amendment challenge to an ordinance that (among other things) barred retailers from using coupons "that provide[] any tobacco products without charge or for less than the listed or non-discounted price," and from selling tobacco products "through ... multi-pack discounts." 731 F.3d at 74. The plaintiffs argued that offering discounts to their customers was an inherently communicative act, but the First Circuit disagreed, reasoning that the ordinance did not "restrict[] retailers or anyone else from communicating pricing information concerning the lawful sale price of cigarettes," but rather "restrict[ed] the ability of retailers to engage in certain pricing practices." *Id.* at 77; *see also Nat'l Ass'n of Tobacco Outlets v. City of New York*, 27 F. Supp. 3d 415, 421–22 (S.D.N.Y. 2014) (relying on the First Circuit's decision to uphold a New York City law banning "the sale of cigarettes and tobacco products below the listed price"). Thus, the fact that the tobacco sellers readily could have lowered their "listed or non-discounted price" to the discounted price—thereby resulting in their customers ultimately paying the exact same amount for tobacco products—did not affect the fact that the ordinance regulated a pricing practice, not speech. Here, too, the fact that a seller can simply raise its sticker price to the

credit-card price—thereby resulting in its credit-card customers ultimately paying the exact same amount as they would have if the seller had set a lower sticker price and imposed a credit-card surcharge—does not affect the fact that Section 518 regulates a pricing practice, not speech.[10]

In short, Plaintiffs have provided no reason for us to conclude that Section 518, which regulates the relationship between a seller's sticker price and its credit-card price, differs in a constitutionally significant way from other laws that regulate prices and therefore do not implicate the First Amendment. As applied to single-sticker-price schemes like the ones described in Plaintiffs' submissions, Section 518 regulates conduct, not speech.[11]

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[10] Along similar lines, Plaintiffs appear to concede that laws against price-gouging—which regulate the difference between the seller's regular price and the price that may be charged in periods of unusually high demand, *e.g.*, N.Y. Gen. Bus. Law § 396-r—do not implicate the First Amendment. We do not see how a seller's normal price for the purpose of anti-price-gouging laws is meaningfully different from its sticker price for the purpose of Section 518.

[11] At least two district courts have previously reached this same conclusion with respect to other states' credit-card surcharge bans. *See Rowell v. Pettijohn*, No. 14–cv–190, slip op. at 6, 2015 WL 3637101 (W.D. Tex. Feb. 4, 2015) ("[T]he Texas Anti–Surcharge law regulates only prices charged, an economic activity that is within the state's police power, and does not implicate the First Amendment."); *Dana's Railroad Supply v. Bondi*, No. 14–cv–134, slip op. at 5 (N.D. Fla. Sept. 2, 2014) (holding that Florida's anti-surcharge law is a "[r]estriction on pricing" and thus not subject to First Amendment scrutiny). *But see Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1206–08 (E.D. Cal. 2015) (holding that California's anti-surcharge law burdened protected speech and violated the First Amendment), *appeal docketed*, No. 15–15873 (9th Cir. filed Apr. 30, 2015).

We note that under *United States v. O'Brien*, 391 U.S. 367 (1968), laws that exclusively regulate conduct (as Section 518 does) may nonetheless implicate the First Amendment in cases where the conduct at issue is "inherently expressive." *Forum for Acad. & Institutional Rights*, 547 U.S. at 66, 126 S.Ct. 1297. Plaintiffs, however, adhering steadfastly to their argument that Section 518 regulates speech, have not asked us to assess Section 518's constitutionality under the Supreme Court's expressive-conduct precedents. *See* Appellees' Br. at 38 n.4 ("Because the no-surcharge law regulates only speech, *United States v. O'Brien* is irrelevant."). We therefore decline to consider any such challenge.

C.

We now turn to the balance of Plaintiffs' First Amendment challenge, which is premised on the assumption that Section 518 applies to sellers who do not post single sticker prices. Because this portion of Plaintiffs' challenge turns on an unsettled question of state law, we do not reach the merits. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *see also Nicholson v. Scoppetta*, 344 F.3d 154, 168 (2d Cir. 2003) ("[W]e have an independent obligation to consider whether *Pullman* abstention is appropriate.").

Two sets of arguments relevant here turn on the question whether Section 518 applies outside the single-sticker-price context (and, if so, to what extent). First, Plaintiffs argue that Section 518 violates the First Amendment as applied to Expressions Hair Design's "dual-price" scheme. Under its scheme, Expressions Hair Design "charge[s] two different prices for haircuts and other services—a lower price for customers paying with cash, check, or debit card and a higher price for customers paying with a credit card." J.A. 57.

Expressions Hair Design allegedly fears that it will be prosecuted under Section 518 simply for "characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card, even though its customers *do* effectively pay more for using a credit card." J.A. 57; *see also* J.A. 58.

Second, Plaintiffs posit a number of hypothetical pricing schemes that they do not actually employ (or profess any desire to employ), but which, Plaintiffs nonetheless suggest, deserve First Amendment protection. To take some specific examples that have been discussed over the course of this litigation: A seller might not post any prices at all, but ultimately charge credit-card customers more than cash customers to pass along the cost of the credit-card companies' swipe fees. Or the seller might post two sets of prices—one for credit and one for cash—but display the cash price more prominently to its customers. Or the seller might "advertise[] two prices with equal prominence: '$100 per widget' and '$103 per widget with 3% credit-card surcharge.'" *Expressions Hair Design*, 975 F. Supp. 2d at 443. Or it might attempt to comply with Section 518 by posting a single sticker price and then offering a cash discount, only to have its employees persistently tell customers that the discounted cash price is actually the "regular" price, and that using a credit-card costs "more," or "extra." Other possibilities surely abound. In any event, because Plaintiffs' submissions in this case do not suggest that they will ever be engaged in this hypothetical conduct, we assume, *arguendo*, that their references to such conduct amount to a facial attack on Section 518. Of course, our conclusion that Section 518 is constitutional as applied to single-sticker-price sellers means that the statute is not unconstitutional in "all of its applications," so the only kind of facial challenge that

remains available to Plaintiffs is an overbreadth challenge. *Wash. State Grange*, 552 U.S. at 449.

Both our precedent and Supreme Court precedent squarely hold that overbreadth challenges predicated on the chilling of commercial speech are not available under the First Amendment. *See Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153 n.16 (2d Cir.), *certified question accepted*, 96 N.Y.2d 931 (2001), and *certified question answered*, 98 N.Y.2d 198 (2002); *see also Fox*, 492 U.S. at 481 ("Although it is true that overbreadth analysis does not normally apply to commercial speech, that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground—our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." (citations omitted)). But as several commentators have pointed out, in the years since *Fox*, commercial speech doctrine has undergone substantial changes. *See* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 Geo. L.J. 497, 509–13 (2015) (observing that Supreme Court precedent since *Central Hudson* has appeared to take a progressively stricter approach to regulations of commercial speech); Troy L. Booher, *Scrutinizing Commercial Speech*, 15 Geo. Mason U. Civ. Rts. L.J. 69 (2004) (arguing that Supreme Court precedent in the years since *Fox* has gradually eroded the distinction between commercial and non-commercial speech, and thus undermined doctrinal differences predicated on that distinction). Our precedent remains clear that no such challenge is available here. Nevertheless, in an abundance of caution we assume, *arguendo*, the availability of such a challenge, and demonstrate that such availability would not alter the outcome of our decision. Indeed, the Supreme Court has

taken just this approach before. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n. 20 (1978).

The First Amendment overbreadth doctrine "permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute." *Alexander v. United States*, 509 U.S. 544, 555 (1993). This doctrine responds to the concern that "the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). However, because there are "obvious harmful effects" to facially invalidating a law "that in some of its applications is perfectly constitutional," courts "vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008); *see, e.g., United States v. Farhane*, 634 F.3d 127, 136–37 (2d Cir. 2011); *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335–36 (6th Cir. 2009) (en banc).

The primary problem with both Plaintiffs' as-applied challenge and their putative overbreadth challenge is that it is far from clear that Section 518 prohibits the relevant conduct in the first place. As noted earlier, the federal statute on which Section 518 was modeled was eventually revised to clarify that it did not, in fact, apply to sellers that did not post single sticker prices: it defined "regular price" as "the tag or posted price ... if a single price is tagged or posted, or the price ... when payment is made by use of [a credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of [a credit card] and the other when payment is made by use of cash, check, or similar means." 15 U.S.C.

§ 1602(y). Plaintiffs' argument that Section 518 extends outside the single-sticker-price context therefore depends on the assumption that Section 518 has a broader reach than the federal statute did. The parties, however, have not cited a single decision by a New York appellate court interpreting the scope of Section 518's prohibition. As we will explain, that dearth of authority dooms both of Plaintiffs' remaining challenges.

"When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration" of whether a ruling on the constitutionality of the state law is, in fact, necessary. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). In particular, a well-established body of law—overlooked almost entirely by the parties and the district court in this case—exists to avoid the "friction-generating error" that can result when a federal court "endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79; *see Allstate Ins. Co.*, 261 F.3d at 150 ("Where a decision is to be made on the basis of state law, ... the Supreme Court has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts."). The pathmarking precedent is *Pullman*, in which the Supreme Court held that federal courts should "abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 384 (2d Cir. 2000) (quoting *All. of Am. Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988)); *see Pullman*, 312 U.S. at 500–01. After the federal court abstains, the parties may seek a controlling interpretation of the challenged law from the state courts, whose decision could cause the federal constitutional question to disappear altogether.

Accordingly, *Pullman* abstention allows federal courts to avoid both "(a) premature decisions on questions of federal constitutional law, and (b) erroneous rulings with respect to state law." *Serio,* 261 F.3d at 150.

The Supreme Court has long relied on the principles animating *Pullman* in the context of First Amendment overbreadth challenges. As noted, an overbreadth challenge cannot succeed unless the challenged statute's application to protected speech is "substantial" in comparison to its legitimate sweep. Not infrequently, the substantiality vel non of a statute's overbreadth will not be self-evident, and will instead depend on how the statute is interpreted. If a state statute is susceptible of multiple interpretations, one of which might render it overbroad and another of which would not, *Pullman's* logic suggests that the state courts—if they have not definitively construed the statute already—should be afforded the opportunity to adopt the narrower, less problematic interpretation. *See Tunick v. Safir,* 209 F.3d 67, 75–76 (2d Cir. 2000) (opinion of Calabresi, J.) (noting that state courts typically apply some version of the rule that a statute should be interpreted, if possible, so as to avoid constitutional doubts). Thus, in *Dombrowski v. Pfister,* the Supreme Court indicated that a state statute with a potentially "overbroad sweep" should not be invalidated in its entirety if a "readily apparent construction suggests itself" under which the state courts could eliminate any constitutional difficulty. 380 U.S. 479, 486, 491 (1965). The Court relied for this proposition on its earlier statement in *Baggett v. Bullitt*—a *Pullman* abstention case—that abstention is appropriate if the challenged state law is susceptible to an interpretation that, if adopted by the state courts, "would eliminate the constitutional issue and terminate the litigation." 377 U.S. 360, 377 (1964); *see Dombrowski,* 380 U.S. at 491; *see also* Michael C. Dorf, *Facial*

Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 287 (1994) ("[W]hen a federal court upholds a state statute against a facial challenge on the basis that the statute could be construed to avoid constitutional infirmities, the court, in effect, abstains from rendering a decision of state law pursuant to *Pullman*."); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 901–02 (1991) (similar).

The First Amendment principle recognized in *Dombrowski*—that a state law should not be struck down as substantially overbroad if a "readily apparent" narrowing construction is available—is not always explicitly acknowledged as an outgrowth of *Pullman* abstention. Nonetheless, federal courts have consistently reaffirmed that in considering an overbreadth challenge to a state statute, we must presume that the state courts will give the law a narrow construction so long as the law is "readily susceptible" to that construction. *Vt. Right to Life Comm.*, 221 F.3d at 386 (quoting *Am. Booksellers Ass'n*, 484 U.S. at 397); *see also, e.g.*, *Ferber*, 458 U.S. at 773 (rejecting an overbreadth challenge premised on the "assum[ption] that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to [its] proscription"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, and its deterrent effect on legitimate expression is both real and substantial.") (citation omitted); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."); Dorf, *supra*, at 287 ("[W]hen the validity of a statutory provision turns on its applicability to persons not before the court, the court need not presume that a state court would construe the statute in

an unconstitutional manner as applied to those persons."). This presumption in favor of state laws' constitutionality is consistent, moreover, with the Supreme Court's emphasis on "[e]xercising judicial restraint in ... facial challenge[s]" in order to avoid "premature interpretations of statutes in areas where their constitutional application might be cloudy." *Wash. State Grange*, 552 U.S. at 450 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

Applying the foregoing principles to the case at hand, we conclude that neither portion of Plaintiffs' First Amendment challenge premised on Section 518's application outside the single-sticker-price context can succeed. In light of the fact that Section 518's enactment was driven by the expiration of the federal surcharge ban, it is entirely possible, if not likely, that New York courts would construe Section 518 as being identical to the lapsed federal ban. Certainly, we see nothing in Section 518's text that would foreclose such an interpretation: although the law lacks the federal statute's explicit definitions, the word "surcharge" itself, which means an additional amount above the seller's regular or usual price, may necessarily signal that the law simply does not apply in the absence of a single sticker price. *See Fulvio I*, 514 N.Y.S.2d at 596 ("While the term 'surcharge' is not precisely defined by the statute itself it retains its everyday, commonsense meaning...") (footnote omitted). New York courts, moreover, like most state and federal courts around the country, will generally interpret statutes so as to avoid constitutional difficulties.[12] *See All. of Am. Insurers v.*

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[12] To be clear, we do not intend to suggest that the First Amendment would, in fact, be violated even if Section 518 were held to have a broader reach than the lapsed federal surcharge ban. For the reasons given in the text, we do not address that question in this opinion. However, to frame the constitutional question that might

Chu, 571 N.E.2d 672, 678 (1991); *Turnick*, 209 F.3d at 76 (opinion of Calabresi, J.).

We therefore conclude that Section 518 is "readily susceptible," *Vt. Right to Life Comm.*, 221 F.3d at 386, to a narrowing construction that "would eliminate the constitutional issue and terminate [this] litigation," *Baggett*, 377 U.S. at 377. As a result, we cannot presume that Section 518 has any applications outside the single-sticker-price context at all—that is, any applications other than the ones we have already found to be constitutional. To put this point more emphatically, we cannot hold a duly enacted state law unconstitutional based entirely on speculation that the New York courts might give it an expansive and arguably problematic reading that its text does not require. This holding both defeats Plaintiffs' putative overbreadth challenge and (on the other side of the same coin) calls for abstention with respect to Plaintiffs' as-applied challenge. In other words, the fact that Section 518 is readily susceptible to the narrowing construction that New York has identified means that Plaintiffs' putative overbreadth challenge fails, because we must presume as a matter of law that New York state courts would adopt such a construction; and the fact that the New York courts have not yet

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arise, we note that "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Whether Section 518 violates the First Amendment outside the single-sticker-price context would therefore appear to turn on whether its application would properly be viewed as involving the seller's speech itself or, instead, underlying conduct that happens to be evidenced by speech. *Cf., e.g., United States v. Caronia*, 703 F.3d 149, 160–63 (2d Cir. 2012).

addressed this interpretive question means that we must abstain from deciding Plaintiffs' as-applied challenge.

The district court suggested that the actions of the New York prosecutors described above, by demonstrating that Section 518 has been enforced in accordance with a broad interpretation, were "fatal" to New York's argument that Section 518 could be interpreted consistently with the lapsed federal ban. *Expressions Hair Design*, 975 F. Supp. 2d at 444. This was clear error. One reported prosecution and one set of threatened prosecutions by the state's executive branch shed little light, if any, on how the New York Court of Appeals would construe Section 518; the state prosecutors could easily have been mistaken as to the law's true breadth. *See Stenberg v. Carhart*, 530 U.S. 914, 941 (2000) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." (alteration in original) (quoting *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment))); *Arizonans for Official English*, 520 U.S. at 79 (noting the risk of federal courts' premising their constitutional rulings on interpretations of state statutes "not yet reviewed by the *State's highest court*" (emphasis added)). While the non-judicial precedents cited by the district court—as well as the linguistic differences between the texts—make it arguable that New York courts *could* interpret the law to have a broader reach than the federal predecessor statute,[13] we decline to speculate as to which reading the state courts will adopt.

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[13] Indeed, although New York invites us to construe Section 518 as being identical to its lapsed federal counterpart if necessary to avoid constitutional difficulties, it never quite abandons the position that Section 518 might apply in the absence of a single sticker price. *See* Appellants' Br. at 61 (noting that a seller's regular price will be

We also decline to certify to the New York Court of Appeals the question whether Section 518 applies to Expressions Hair Design's dual-price scheme.[14] We recognize that "[c]ertification today covers territory once dominated by ... '*Pullman* abstention.'" *Arizonans for Official English*, 520 U.S. at 75. Whereas *Pullman* abstention "entail[s] a full round of litigation in the state court system before any resumption of proceedings in federal court," certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* at 76; *see also Bellotti v. Baird*, 428 U.S. 132, 150–51 (1976); *Osterweil*, 706 F.3d at 144–45. Because of these advantages, this Court has noted that it will generally be preferable "to certify, rather than abstain, wherever it would 'serve the same purpose [as *Pullman*] more efficiently.'" *Nicholson*, 344 F.3d at 168 (alteration in original) (quoting *Serio*, 261

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its "single posted price" in "the vast majority of cases," but "can also be determined through evidence of how the seller calculates its usual costs and desired profit margins").

[14] In a pure overbreadth challenge based on a statute's application to hypothetical situations not before the court, a determination that the statute is readily susceptible to an interpretation under which it would not cover the hypothetical situations might well end the litigation regardless of the possibility of certification. *See Am. Booksellers Ass'n*, 484 U.S. at 397 ("[I]n determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, *it will be upheld*.") (emphasis added). In such a case, the application of the statute to the challenger's conduct should be clear, *see Fox*, 492 U.S. at 484–85, 109 S.Ct. 3028, and we doubt the appropriateness of asking state courts purely hypothetical questions. So to the extent that certification might be appropriate here— which, in any event, we conclude that it is not—it would be appropriate only with respect to Plaintiffs' as-applied challenge.

F.3d at 155 (Walker, C.J., concurring)). Still, certification is not "obligatory" even if available, and the decision whether to certify or abstain "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

Here, we believe that certification is not preferable, primarily because of the way in which this case has been litigated. Were we to certify, Plaintiffs' challenge would be definitively resolved if the New York Court of Appeals were to interpret Section 518 consistently with the lapsed federal surcharge ban. But if the Court of Appeals were to give the statute a different construction, two key questions would remain: (1) whether the statute applies to Expressions Hair Design specifically (a question of state law that we would presumably ask the Court of Appeals to answer), and (2) if so, whether that application violates the First Amendment (a question of federal law that we would answer). Both questions would likely prove difficult in light of the present state of the record, since this case has been litigated almost entirely on the pleadings and the parties have focused their legal analysis primarily on Section 518's application to single-sticker-price sellers. And, in determining whether a seller that posts separate cash and credit-card prices has actually been imposing a forbidden credit-card surcharge, a particularized understanding of how the seller displays its prices and communicates with customers would seem especially important. We will not burden the Court of Appeals with questions that potentially cannot be answered without additional factual development.[15] *Cf. Scribner v. Summers*, 138 F.3d 471,

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[15] Indeed, federal courts themselves have declined to consider pre-enforcement as-applied challenges that lack an adequate "foundation." *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 127 (2d Cir. 2014) (quoting *Ctr. for Individual Freedom v. Madigan*,

473 (2d Cir. 1998) ("[W]e would be inclined to certify the question to the New York Court of Appeals should the question be presented on an appropriate record."). Because additional development of the record would be necessary, moreover, one of the primary benefits that certification enjoys over *Pullman* abstention—eliminating the delay and cost of litigating anew in state court—is not as weighty here. Finally, we think there is a minimal risk that any First Amendment rights Expressions Hair Design may be exercising will be compromised by our decision to abstain. It has employed its dual-price scheme without being prosecuted thus far, and New York has, in this case, effectively disavowed any interpretation of Section 518 under which dual-price sellers will be prosecuted simply because their employees happen to *refer* to their pricing schemes as involving a "surcharge."

* * *

In sum: Section 518 does not violate the First Amendment as applied to single-sticker-price sellers. And, because it is unclear whether the law applies outside that specific context, there is no basis for us to conclude that the law violates the First Amendment in any of its applications, much less on its face. As the foregoing discussion illustrates, federal courts can occasionally be an unwise choice of forum for plaintiffs seeking the pre-enforcement invalidation of disfavored state laws. "[R]espect for the place of the States in our federal system" requires no less. *Arizonans for Official English*, 520 U.S. at 75.

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697 F.3d 464, 475 (7th Cir. 2012)); *see also Justice v. Hosemann*, 771 F.3d 285, 292–95 (5th Cir. 2014); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir. 2010).

II.

The district court also erred in holding that Section 518 is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. A law is void for vagueness if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) lacks "explicit standards for those who apply [it]." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186–87, 191 (2d Cir. 2010) (alteration in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000), and *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007)).[16] A vagueness challenge may be either facial or as-applied. *See Farrell v. Burke*, 449 F.3d 470, 495 & n.11 (2d Cir. 2006). Again, we construe Plaintiffs' submissions as raising a facial challenge to Section 518, as well as an as-applied challenge concerning the statute's application to two specific pricing schemes: (1) the single-sticker-price scheme that Plaintiffs say they would like to employ and (2) the dual-price scheme employed by Expressions Hair Design. These challenges fail for essentially the same reasons as Plaintiffs' First Amendment challenges.

Under traditional standards governing facial vagueness challenges, a law is facially unconstitutional only if it is "impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside*,

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[16] The Due Process Clause requires "a greater degree of specificity" where the challenged statute is "capable of reaching expression sheltered by the First Amendment." *VIP of Berlin*, 593 F.3d at 186 (quoting *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006)); see *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Consistent with their argument that Section 518 regulates "pure speech," Plaintiffs contend that this heightened specificity requirement applies in this case. Because we would reject Plaintiffs' challenge regardless of which standard applies, we assume they are correct.

Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). Thus, "if a statute has a core meaning that can reasonably be understood, then it may validly be applied to conduct within the core meaning, and the possibility of such a valid application necessarily means that the statute is not vague on its face." *Brache v. Westchester County*, 658 F.2d 47, 51 (2d Cir. 1981); *see also Cunney v. Bd. of Trs. of Vill. of Grand View*, 660 F.3d 612, 623 (2d Cir. 2011).

Here, Section 518 plainly has a "core meaning that can reasonably be understood": sellers who post single sticker prices for their goods and services may not charge credit-card customers an additional amount above the sticker price that is not also charged to cash customers. In other words, Section 518's core meaning is identical to the scope of the lapsed federal surcharge ban. This conclusion follows directly from Section 518's use of the word "surcharge," which means an additional charge above the usual price. We have complete confidence that sellers "of ordinary intelligence" will—if they post single sticker prices—readily understand how to avoid imposing a credit-card surcharge, and that New York authorities will have sufficient guidance in determining whether such sellers have violated the law. Accordingly, Section 518 may validly be applied to single-sticker-price sellers without violating the Due Process Clause; and under the traditional standards governing facial challenges, that means that the statute is not unconstitutionally vague on its face. *See Brache*, 658 F.2d at 51. In other words, Plaintiffs' as-applied challenge involving single-sticker-price sellers fails, so under traditional standards, their facial challenge fails as well. *See Farrell*, 449 F.3d at 485 (noting that "the permissibility of a facial challenge sometimes depends upon whether the challenged regulation was constitutional as applied to the plaintiff").

The Supreme Court has suggested, however, that another variety of facial vagueness challenge—akin to a First Amendment overbreadth challenge—may be available "in the First Amendment context." *United States v. Williams*, 553 U.S. 285, 304 (2008). In First Amendment cases, the Court has said, "[f]acial vagueness challenges may go forward ... if the challenged regulation 'reaches a substantial amount of constitutionally protected conduct,'" even if it is not unconstitutionally vague as applied to the challenger. *Farrell*, 449 F.3d at 496 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)). This formulation is slightly perplexing, largely because the scope of the challenged law is precisely what is at issue in a vagueness challenge. Here, for example, Plaintiffs argue that it is unclear how far Section 518 extends, and thus how much (allegedly) "constitutionally protected conduct" the law reaches. The relevant question, then, appears to be how much constitutionally protected conduct the law *arguably* reaches—that is, whether the law's vagueness will result in "a substantial chilling effect on protected conduct." *Id.* at 497; *see Williams*, 553 U.S. at 304 (explaining that plaintiffs are "permitt[ed] ... to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech"); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (stating that a facial vagueness challenge is available if "the statute's deterrent effect on legitimate expression is ... 'both real and substantial'" (quoting *Erznoznik*, 422 U.S. at 216)). Without reaching the question whether this species of facial vagueness challenge is otherwise applicable in this context, we agree with New York that Section 518 is readily susceptible to an interpretation under which it would clearly reach *no* constitutionally protected conduct

and therefore lack any meaningful chilling effect on such conduct.[17]

A statute is unconstitutionally vague only if it cannot be construed in a way that eliminates the vagueness problem. *See Skilling v. United States*, 561 U.S. 358, 403–04 (2010); *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute...."). Thus, in considering a vagueness challenge to a state statute, a federal court must consider not only how the law is "presently drafted," but also how it has been "construed by the state courts." *Kolender*, 461 U.S. at 358; *see Wainwright v. Stone*, 414 U.S. 21, 22–23 (1973) ("For the purpose of determining whether a statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.'" (quoting

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[17] The Supreme Court recently signaled another arguable departure from the traditional rule that, outside the First Amendment context, a statute is facially invalid only if it is unconstitutionally vague in all of its applications. In *Johnson v. United States*, the Court held that the so-called "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), was void for vagueness despite the existence of "straightforward cases" in which the clause's application would be clear. 135 S. Ct. 2551, 2560, (2015); *see id.* at 2580–82 (Alito, J., dissenting) (objecting to this aspect of the majority's reasoning). The Court did not articulate a standard for the percentage of cases in which a law's application must be vague in order for it to be facially unconstitutional. A plurality of the Court previously held that under certain circumstances, a statute may be facially unconstitutional if "vagueness permeates [its] text." *United States v. Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003) (en banc) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion)). We need not decide on the correct standard, however, because the narrowing construction described in the text would leave Section 518 with very few, if any, unconstitutionally vague applications.

Minnesota ex rel. Pearson v. Prob. Court, 309 U.S. 270, 273 (1940))). And, just as in the First Amendment overbreadth context, if an allegedly vague state law has not yet been construed by the state courts, a federal court must determine whether the law is "reasonably susceptible of constructions that might undercut or modify [the] vagueness attack." *Greater N.Y. Metro. Food Council v. McGuire*, 6 F.3d 75, 77 (2d Cir. 1993) (per curiam) (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 307 (1979)). If the law is susceptible to such a construction, then the federal court should "abstain to afford the state courts a reasonable opportunity to construe the statute." *Id.*

If the New York courts interpret Section 518 as being identical to the lapsed federal surcharge ban, then the law (as construed) would not be unconstitutionally vague on its face, and it clearly would not apply to dual-price sellers like Expressions Hair Design regardless of what those sellers' employees might say about their pricing schemes. Accordingly, having concluded that Section 518 enjoys a core set of applications in which it is not unconstitutionally vague—namely, its application to sellers who post single sticker prices—we find abstention appropriate in this context also, and therefore do not reach the balance of Plaintiffs' vagueness challenge.

CONCLUSION

We have considered Plaintiffs' remaining arguments and find them to be without merit. For the foregoing reasons, we **VACATE** the judgment below and **REMAND** for the dismissal of Plaintiffs' claims.

APPENDIX B

United States Court of Appeals,
Second Circuit

Nos. 13–4533, 13–4537

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs–Appellees,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County,
Defendants–Appellants.

November 20, 2015

Errata Sheet for Opinion Dated September 29, 2015

Expressions Hair Design, et al. v. Schneiderman, et al.,
Nos. 13-4533, 13-4537
Argued: March 5, 2015
Decided: September 29, 2015

ERRATA

PAGE (of slip op)	LINE	DELETE	INSERT
4	7–10	On appeal, we conclude that Section 518 violates neither the First Amendment nor the Due Process Clause, and we therefore vacate the judgment entered by the district court and remand for dismissal of Plaintiffs' claims.	On appeal, we conclude that the application of Section 518's text to surcharges added to single sticker prices violates neither the First Amendment nor the Due Process Clause. We further decline to address other applications, invoking *Pullman* abstention. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). We therefore vacate the judgment entered by the district court and remand for dismissal of Plaintiffs' claims.

APPENDIX C

In the United States District Court
for the Southern District of New York

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County, and Gerald F. Mollen, in his official capacity as District Attorney of Broome County,
Defendants.

13-cv-3775 (JSR)

November 4, 2013

STIPULATED FINAL JUDGMENT AND PERMANENT INJUNCTION

JED S. RAKOFF, District Judge.

The plaintiffs, Expressions Hair Design, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, *Patio.com* LLC, and David Ross, and the defendants, Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County, and Gerald F. Mollen, in his official capacity as District Attorney of Broome County, by their undersigned counsel, hereby agree and stipulate, subject to Court approval, as follows:

WHEREAS, the plaintiffs filed their complaint on June 4, 2013, claiming that New York General Business Law § 518 violates their First Amendment rights to free speech, is unconstitutionally vague in violation of their Fourteenth Amendment due process rights, and is preempted by the Sherman Antitrust Act;

WHEREAS, the plaintiffs filed a motion for a preliminary injunction on June 17, 2013, seeking an injunction prohibiting the attorney general from enforcing § 518 against them on the ground that it would violate their right to free speech under the First Amendment and would be unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment;

WHEREAS, the attorney general moved to dismiss the complaint on July 12, 2013;

WHEREAS, the plaintiffs filed a first amended complaint on July 15, 2013, adding as defendants district attorneys Vance, Hynes, and Mollen;

WHEREAS, the Court, on consent of the parties, deemed the attorney general's motion to dismiss to be directed against the first amended complaint on July 31, 2013;

WHEREAS, the district attorneys joined in the attorney general's motion to dismiss, as well as the attorney general's opposition to the plaintiffs' motion for a preliminary injunction, on August 7, 2013;

WHEREAS, the Court, on consent of the parties, deemed the plaintiffs' motion for a preliminary injunction to be directed not only against the attorney general, but also against the district attorneys;

WHEREAS, the Court, in an opinion and order dated October 3, 2013, granted the plaintiffs' motion for a preliminary injunction and denied the defendants' motion to dismiss;

WHEREAS, the entry of final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims now will expedite appellate review of the District Court's determination as to the constitutionality of a state law and eliminate the need for further litigation;

NOW, THEREFORE, it is hereby stipulated and agreed that:

(a) There is no just reason for delay of entry of a final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims pursuant to Rule 54(b). These constitutional claims present legal issues that are independent of the plaintiffs' antitrust preemption claim, which the Court concluded must be subjected to a fact-intensive rule of reason analysis. Moreover, the parties have a strong interest in expediting the litigation on the First and Fourteenth Amendment claims. Because the

plaintiffs will not pursue their antitrust preemption claim if they prevail on their constitutional claims, an immediate appeal of these constitutional claims may avert further litigation on the antitrust claim, thereby avoiding the high costs of fact and expert discovery, motion practice, and potentially a trial. Entry of a final judgment on the First Amendment and Fourteenth Amendment claims therefore will be efficient and fair for the court and the parties.

(b) For the reasons given in the Court's October 3, 2013 opinion and order, the Court grants the following declaratory relief to the plaintiffs before the Court: The Court declares that New York General Business Law § 518 violates the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment;

(c) For the reasons given in the Court's October 3, 2013 opinion and order, the Court permanently enjoins the defendants from enforcing New York General Business Law § 518 against the plaintiffs;

(d) The defendants reserve their right to appeal this stipulated final judgment, declaration, and permanent injunction;

(e) In light of the relief described above, the Court dismisses the plaintiffs' antitrust preemption claim as moot, without prejudice to the plaintiffs' right to revive that claim if this stipulated final judgment is reversed on appeal; and

(f) Pursuant to Federal Rule of Civil Procedure 54(d), a motion by any party for attorneys' fees, related nontaxable expenses, or costs shall be filed no later than 30 days after the expiration of the period for appeal or, in the event of an appeal, shall be filed within 30 days of the judgment of the court of appeals

or the final judgment of this Court on remand, whichever is later.

STIPULATED AND AGREED BY:

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IT IS ORDERED THAT:

(a) This stipulated final judgment is hereby granted;

(b) The judgment in favor of plaintiffs rendered by the Court in this stipulated final judgment shall be entered as a final judgment and the clerk is directed to enter such judgment immediately; and

(c) It is expressly determined that there is no just reason for delay in this entry of a final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims pursuant to Rule 54(b). These constitutional claims present legal issues that are independent of the plaintiffs' antitrust preemption claim, which is subject to a fact-intensive rule of reason analysis. An immediate appeal of these constitutional claims may avert further litigation on the antitrust preemption claim, thereby avoiding the high costs of fact and expert discovery, motion practice, and potentially a trial. Entry of a final judgment on the First Amendment and Fourteenth Amendment claims therefore will be efficient and fair for the court and the parties.

APPENDIX D

In the United States District Court
for the Southern District of New York

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County, and Gerald F. Mollen, in his official capacity as District Attorney of Broome County,
Defendants.

13-cv-3775 (JSR)

October 3, 2013

PRELIMINARY INJUNCTION, OPINION, AND ORDER

JED S. RAKOFF, District Judge.

Alice in Wonderland has nothing on section 518 of the New York General Business Law. Under the most plausible interpretation of that section, if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% "swipe fee." But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved. As discussed below, this virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment and renders section 518 unconstitutional.

The instant action is brought by five retailers and their principals against the Attorney General of the State of New York and the District Attorneys of New York, Kings, and Broome Counties challenging the constitutionality of section 518 of the New York General Business Law. That statute prohibits a seller from imposing a "surcharge" on customers who elect to pay with a credit card, rather than by cash, check, or other similar means, *see* N.Y. Gen. Bus. Law § 518, and has been applied so as to prohibit retailers from informing their customers that the fees they pay to credit card companies and then pass on to their customers are in the nature of surcharges above the price they would otherwise charge. Plaintiffs wish to impose surcharges on credit-card transactions and to so inform their customers, but are constrained from doing so by section 518, which they assert violates the First Amendment, is unconstitutionally vague, and also is preempted by the Sherman Antitrust Act. Pending before the Court are

plaintiffs' motion for a preliminary injunction based on the First Amendment and vagueness challenges and defendants' cross-motion to dismiss the complaint in its entirety. For the reasons that follow, plaintiffs' motion is granted, and defendants' motion is denied.

Section 518 provides: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." *Id.* Violations of this prohibition carry criminal penalties: "any seller who violates [section 518] shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both." *Id.* Criminal prosecutions under section 518 are brought by the appropriate county District Attorney. *See* N.Y. County Law §§ 700, 927. In addition, the New York Attorney General is authorized to bring civil enforcement actions to enjoin "continuous" violations of the statute, N.Y. Gen. Bus. Law § 513, and to seek restitution, damages, and cancellation of business licenses against "repeat[]" or "persistent" offenders, N.Y. Exec. Law § 63(12).

Section 518 by its terms only prohibits credit-card "surcharge[s]," and all parties here agree that the statute does not bar sellers from offering an equivalent "discount" to consumers who use cash.[1] In terms of their immediate economic consequences, surcharges and discounts are merely different labels for the same thing—a price difference between cash and credit. A number of studies have indicated, however, that consumers perceive credit-card surcharges negatively as a kind of loss or penalty, while cash discounts are perceived positively as a kind of gain or bonus. *See*

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[1] For convenience, and following the parties' usage, the Court hereinafter refers to all non-credit forms of payment as "cash."

generally Daniel Kahneman, Jack L. Knetch & Richard H. Thaler, Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. Econ. Persp. 193, 199 (1991); Adam Levitan, The Antitrust Super Bowl: America's Payment Systems, No–Surcharge rules, and the Hidden Costs of Credit, 3 Berkeley Bus. L.J. 265, 280–81 (2006); *see also* S. Rep. No. 97–23, at 3 ("The [U.S. Senate Banking] Committee recognizes that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different.").

The parties draw very different conclusions about the impact these varying consumer reactions have on the financial relations between buyers, sellers, and third-party credit providers. Plaintiffs claim that framing the incremental cost of credit-card usage as a "surcharge" is an accurate and effective way to convey to consumers that paying with credit is actually more expensive than paying with cash. Absent surcharges, consumers may be unaware that when they use a credit card, the relevant credit card company charges the retailer a fee, usually around two to three percent of the sales price. *See, e.g.*, Decl. of Linda Fiacco ("Fiacco Decl.") ¶ 3; FAC ¶ 7. Such fees, known as "swipe fees," are among greatest and fastest growing operating expenses for merchants in some industries. *See* Adam J. Levitin, Priceless? The Economic Costs of Credit Card Merchant Restraints, 55 UCLA L. Rev. 1321, 1345 (2008); FAC ¶ 28. Plaintiffs accordingly want to impose credit card surcharges, rather than give cash discounts, and to so inform their customers, precisely because consumers are more likely then to notice the fees, dislike them, and switch to cash in order to avoid them. Over time, this behavior will place downward pressure on swipe fees, which credit card companies will be forced to reduce in order to prevent more and more consumers from switching to

cash. *See* Levitan, The Antitrust Super Bowl, *supra*, at 313 (noting that after surcharges were permitted in Australia and customers were notified of same, swipe fees there declined significantly); FAC ¶ 27.

Plaintiffs also argue that, in the absence of being able to impose surcharges and label them as such, some retailers cannot effectively call consumers' attention to the price differences between cash and credit, and therefore must charge higher headline prices for everyone. Surcharge bans like section 518 thus in effect force cash users (who are said to be disproportionately poor and minority persons), to subsidize the retail purchases of credit card users. *See* Adam J. Levitin, Priceless? The Social Costs of Credit Card Merchant Restraints, 45 Harv. J. on Legis. 1, 35 (2008); FAC ¶¶ 28–29. This hidden, regressive subsidy for credit card usage is not insubstantial. *See* Scott Schuh, Oz Shy, & Joanna Stavins, Who Gains and Who Loses from Credit Card Payments? at 21 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 10–03, 2010) ("The average cash-paying household transfers $149 ... annually to card users," each of whom on average "receives a subsidy of $1,333 ... annually from cash users.").

Defendants, however, contend that, in enacting section 518, the New York legislature effectively concluded that a surcharge ban would actually protect consumers from unfair surprise and deception. Defendants note that consumers tend to plan and anchor their expectations around the advertised sticker price of a given item they intend to purchase. If a consumer later learns that she can earn a discount from that price for using cash, she is not harmed. But if the consumer later learns that there is an additional charge, above the sticker price, if she chooses to pay by credit card, her expectations may be frustrated.

Whatever its purported purpose, section 518 is the product of a decades-long battle between credit card companies on the one hand and retailers and consumer advocates on the other. In the early days of credit cards, credit card companies included clauses in their contracts with retailers that strictly forbade those retailers from charging different prices for cash and credit transactions. *See* Edmund W. Kitch, The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?, 6 J.L. Econ. & Org. 217, 219–20 & n.4 (1990); FAC ¶ 32. That practice ended in 1974 when Congress amended the Truth in Lending Act to provide that a "card issuer may not, by contract or otherwise, prohibit any ... seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Fair Credit Billing Act, Pub. L. No. 93–495, tit. III, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)).

Thereafter, the battleground moved from whether merchants could charge different prices for cash and credit to how merchants could communicate those different prices to consumers. In 1976, at the urging of the credit card industry, Congress passed another amendment to the Truth in Lending Act, providing, as section 518 now provides, that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." Act of Feb. 27, 1976, Pub. L. No. 94–222, § 3(c), 90 Stat. 197, 197 (codified at 15 U.S.C. § 1666f(a) (1980)). In this 1976 amendment, Congress defined the terms "discount" (as used in the preexisting version of the Act) and "surcharge" (as used in the amendment) as follows:

> The term "discount" ... means a reduction made from the regular price. The term "discount" ... shall not mean a surcharge.
>
> ... The term "surcharge" ... means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.

Id. § 3(a) (codified at 15 U.S.C. § 1602 (1980)).

The 1976 amendment placed a three-year time limit on the no surcharge provision, but in 1978, Congress extended the provision for an additional two years. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95–630, § 1501, 92 Stat. 3641, 3713. In 1981, with the support of the credit card industry and over the opposition of federal regulators, Congress again extended the sunset for another three years. *See* Cash Discount Act, Pub. L. No. 97–25, § 201, 95 Stat. 144, 144; S. Rep. No. 97–23, at 8–10 (additional views of Sen. Proxmire) (describing the positions of credit card companies and federal regulators). In addition, supplementing the provisions that had defined "discount" and "surcharge" in terms of the retailer's "regular price," the 1981 renewal added a provision defining "regular price" as follows:

> the term "regular price" means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of ... a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of ... a credit card and the other when payment is made by use of cash, check, or similar means.

Cash Discount Act § 102. This definition was intended to clarify that the no-surcharge provision "permits merchants to have two-tier pricing systems and to offer a differential between the credit price and the cash price" as long as merchants ensure that "when prices are tagged or posted, the consumers will be exposed to the highest price when they see a tagged or posted price." S. Rep. No. 97–23, at 4.

In 1984, however, Congress allowed the no-surcharge provision to lapse. In response, the credit card industry began lobbying for state-level no-surcharge laws, which were eventually enacted in ten states, including New York. *See* N.Y. Bus. Law § 518.[2] New York's no-surcharge provision, section 518, copied the operative text of the then-lapsed federal provision prohibiting surcharges, but did not include the federal definitions, or any other definitions, of "discount," "surcharge," or "regular price."

Contemporaneously, credit card companies also began including contractual no-surcharge provisions in their agreements with retailers. *See* Amos Tversky & Daniel Kahneman, Rational Choice and the Framing of Decisions, 59 J. Bus. S251, S261 (1986); FAC ¶¶ 34, 43. In January 2013, however, two major credit card issuers, Visa and MasterCard, agreed to drop their contractual prohibitions against surcharges as part of a larger antitrust settlement. *See* Jessica Silver–Greenberg, Visa and MasterCard Settle Claims of Antitrust, N.Y. Times, July 14, 2012, at B1; FAC ¶ 48. As a result, state no-surcharge laws, previously redundant of retailers'

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[2] *See also* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5–2–212(1); Conn. Gen. Stat. § 42–133ff(a); Fla. Stat. § 501.0117; Kan Stat. Ann. § 16a–2–403; Me. Rev. Stat. 9–A, § 8–303(2) (repealed Sept. 27, 2011); Mass Gen. Laws ch. 140D, § 28A(a); Okla. Stat. tit. 14a, § 2–211(A); Tex. Fin. Code § 339.001.

contractual obligations, have now taken on renewed importance.

The ten plaintiffs in this case consist of five New York retail businesses and their principals. All of these businesses pay swipe fees of around two-to-three percent per credit transaction, and accordingly would like to charge higher prices for credit transactions than for cash. They do not want to frame this price difference as a cash discount, however, because, *inter alia*, discounts "would make advertised prices look higher than they are, without making it transparent that the higher price would be due solely to credit card transaction costs—precisely the information [they] wish to convey to [their] consumers." Decl. of Peter Freeman Decl. ("Freeman Decl.") ¶ 8; Decl. of Donna Pabst ("Pabst Decl.") ¶ 5 (similar); Decl. of David Ross ("Ross Decl.") ¶¶ 8–9 (similar); Fiacco Decl. ¶¶ 5–8; Decl. of Stephen Milles ("Milles Decl.") ¶¶ 5–6; FAC ¶¶ 2–4, 7, 10, 13, 16. Given section 518, however, plaintiffs fear that they may be sued or even prosecuted if they frame any price difference as imposing a "surcharge" or otherwise convey to their customers that they will be charged *more* for paying with credit rather than *less* for paying with cash. *See* Freeman Decl. ¶ 9; Pabst Decl. ¶ 6; Ross Decl. ¶ 10; Fiacco Decl. ¶¶ 8–9; Milles Decl. ¶¶ 6–7; FAC ¶¶ 4–5, 8, 11, 13, 16.

Because of these fears, moreover, four of the five plaintiff businesses simply charge the same price for all transactions, even though they would like to charge more for credit. *See* Freeman Decl. ¶ 6; Pabst Decl. ¶ 5; Ross Decl. ¶ 7; Milles Decl. ¶ 4; FAC ¶¶ 7, 11, 13, 16. The remaining business, Expressions Hair Design ("Expressions"), a unisex hair salon in Vestal, New York, does charge different prices for cash and credit, but section 518 effectively restricts how it describes those prices to its customers. According to the salon's co-

owner plaintiff Linda Fiacco, "[u]ntil 2012, Expressions posted a sign at our counter informing all customers that, due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card to purchase services." Fiacco Decl. ¶ 6; *see* FAC ¶ 3. However, after a customer who is a lawyer informed the salon of New York's no-surcharge law, Expressions removed the sign. Fiacco Decl. ¶ 6; FAC ¶ 3. Expressions still charges a higher price for credit, but because of section 518, the salon's managers and employees "try to be as careful as we can to avoid characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card," as opposed to a discount for cash. Fiacco Decl. ¶ 7; *see* FAC ¶ 5. Fiacco states that Expressions would like to return to its former policy of prominently advertising a surcharge on all credit transactions, but cannot because of fears of being prosecuted or sued for violation of section 518. Fiacco Decl. ¶ 8; FAC ¶ 4.

Against this background, the Court turns to plaintiffs' motion for a preliminary injunction on its First Amendment and void-for-vagueness claims and defendants' cross-motion to dismiss the complaint in its entirety.[3]

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[3] In their initial complaint, plaintiffs named only the Attorney General as a defendant, but later amended their complaint to name the three District Attorneys as well. *See generally* Compl.; FAC. Before plaintiffs filed their amended complaint, however, the Attorney General moved to dismiss the initial complaint. On consent of the parties, the Court later deemed the motion to dismiss to be directed against the First Amended Complaint. *See* Order of July 31, 2013. Also on consent of the parties, the Court deemed plaintiffs' motion for a preliminary injunction to be directed not only against the Attorney General, but also against the District Attorneys. *See* Order of August 14, 2013. The District Attorneys joined in the Attorney General's motion to dismiss, as well as his opposition to the

Regarding plaintiffs' motion, a plaintiff seeking a preliminary injunction must ordinarily show "1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and 3) that the public's interest weighs in favor of granting an injunction." *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010) (internal quotation marks and citations omitted). However, "[w]hen, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *Id.*

As for defendants' motion, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A court considering a motion to dismiss must "accept[] as true all factual claims in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013).

Before applying these standards to the motions at hand, the Court must first address defendants' threshold argument that certain plaintiffs lack Article III standing and that plaintiffs' entire pre-enforcement challenge to section 518 is not ripe for adjudication. As to standing, Article III of the Constitution limits federal courts' jurisdiction to "Cases" and "Controversies," and "[o]ne element of the case-or-controversy requirement is that

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motion for a preliminary injunction.

plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*133 S. Ct. 1138, 1146 (2013) (internal quotation marks omitted). This constitutional requirement demands that

> (1) the plaintiff have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury be fairly traceable to the challenged action of the defendant, and (3) it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hedges v. Obama, 724 F.3d 170, 188 (2d Cir. 2013) (internal quotation marks omitted).

The closely related doctrine of ripeness has both constitutional and prudential aspects. "To the extent that issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' a conclusion that the complaining party will sustain immediate injury and that such injury would be redressed by the relief requested would appear to satisfy this constitutional requirement." *Simmonds v. I.N.S.*, 326 F.3d 351, 358 (2d Cir. 2003) (internal quotation marks and alterations omitted). As a prudential matter, courts also consider "(1) whether an issue is fit for judicial decision and (2) whether and to what extent the parties will endure hardship if decision is withheld." *Id.* at 359.

That said, courts "assess pre-enforcement First Amendment claims ... under somewhat relaxed standing and ripeness rules." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). Void-for-vagueness claims grounded in First Amendment concerns receive similar treatment. *See Dickerson v. Napolitano*, 604 F.3d 732, 742 (2d Cir. 2010). As the Second Circuit has explained, "plaintiffs contesting

statutes or regulations on First Amendment grounds face an unattractive set of options if they are barred from bringing a facial challenge: refrain[] from activity they believe the First Amendment protects, or risk civil or criminal penalties for violating the challenged law." *Nat'l Org. for Marriage*, 714 F.3d at 689 (internal quotation marks omitted). Accordingly, in order to satisfy the requirements of standing and ripeness, "[a] plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it." *Id.* (internal quotation marks omitted).

Taking the issue of ripeness first, this well-settled standard disposes of defendants' contention that plaintiffs' claims are unripe. Defendants argue that this suit is premature because no plaintiff has yet been the subject of civil or criminal enforcement for violating section 518, and plaintiffs supposedly would suffer no hardship from postponing review. But that argument simply ignores the gravamen of this suit, which claims that section 518 presently burdens and chills plaintiffs' fundamental right of free speech. That is an cognizable injury plaintiffs would continue to suffer on an ongoing basis if review were withheld. This suit is clearly ripe.

As to standing, defendants recognize the governing principles and concede that four of the ten plaintiffs in this action legitimately fear enforcement and therefore have standing. *See* Defs.' Reply Mem. of Law in Further Supp. of Mot. To Dismiss at 8–9. While this concession alone is sufficient to allow this suit to continue, the Court must resolve each plaintiff's standing in order to determine the scope of any injunction in this case—i.e., precisely which parties the defendants would be formally prevented from suing or prosecuting under section 518.

In addition, it is useful to discuss defendants' challenge to the remaining six plaintiffs' standing because it casts light on the proper interpretation of section 518.

As an initial matter, plaintiffs argue that they all have standing because, as they read it, section 518 draws the line between permissible discounts and impermissible surcharges based solely on the words and labels a seller uses to describe its prices. Here, each plaintiff avers that but for section 518, they would charge different prices for cash and credit and would frame that price difference as a credit-card surcharge. Plaintiffs therefore claim that they all legitimately fear enforcement and therefore have standing.

Defendants, however, contend that section 518 "is an anti-fraud statute prohibiting sellers from charging credit card users an additional hidden fee not displayed as prominently as the cash price." Mem. of Law in Supp. of Defs.' Mot. To Dismiss and in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' Mem.") at 21. On defendants' reading, a "surcharge" is any increase over a seller's regular price, and a seller's "regular" price, in turn, is the price, in dollars and cents, that is most prominently displayed or communicated to consumers. Hence, if a seller's credit-card price is displayed, in dollars and cents, at least as conspicuously as the cash price, then the credit-card price is the "regular price," and there can be no impermissible surcharge.

According to defendants, six of the plaintiffs here—The Brooklyn Farmacy & Soda Fountain, Inc., its co-owner Peter Freeman, Bunda Starr Corp., its president Donna Pabst, Patio.com LLC, and its founder and president David Ross—do not propose to advertise their credit-card prices any less prominently than their cash prices. *See generally* Freeman Decl.; Pabst Decl.; Ross

Decl.[4] Defendants thus argue that these plaintiffs have not proposed to do anything that would violate section 518, and therefore lack standing. The remaining four plaintiffs, however—Expressions, Fiacco, Five Points Academy, and its vice-president Stephen Milles—assertedly want to advertise and their credit-card surcharges only as a percentage fee added on top of their cash prices. *See* Suppl. Decl. of Linda Fiacco; Suppl. Decl. of Stephen Milles. Because these plaintiffs propose not to disclose their credit-card prices in dollars and cents at all (i.e., not as a "sticker price"), their proposals would violate defendants' reading of the statute. Defendants accordingly concede that these four plaintiffs have standing.

But defendants' rather convoluted interpretation of the statute runs into several difficulties. The most obvious is the plain text of section 518 itself, which, as previously stated, reads: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Bus. Law § 518. The statute simply bans "surcharge[s]." This, on its face, chills any retailer from characterizing its prices as including a surcharge; conversely it says nothing, and provides no warning or guidance, about how prominently

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[4] To be precise, defendants contend that it is unclear whether Patio.com intends to display the credit card surcharge prominently or only as a line item on the customer's receipt. *See* Defs.' Mem. at 34–35. Fairly read, however, the Ross Declaration indicates that Patio.com wants to include a line item on its receipt in addition to other means of prominently advertising the surcharge. The Ross Declaration states that Patio.com wants "to charge a different price for credit card usage" and "call that price a 'surcharge'" in order to "provide a meaningful incentive to many customers to switch to paying with a debit card, cash or check." Ross Decl. ¶ 8.

prices must be displayed or whether swipe fees must be disclosed in dollars and cents or as a percentage.

Defendants' interpretation also produces absurd results. Consider, for example, a seller who advertises two prices with equal prominence: "$100 per widget" and "$103 per widget with 3% credit-card surcharge." It strains credulity to suggest that a seller using the latter language could not legitimately fear prosecution under section 518.

The actual history of prosecution under section 518 also belies defendants' interpretation. In 1987, just a few years after section 518 was enacted, the District Attorney for Bronx County prosecuted and convicted a gas-station owner, Eugene Fulvio, for imposing an unlawful credit-card fee of five cents per gallon, which was advertised as such. After trial, the Bronx County Criminal Court granted Fulvio's motion to dismiss the charge under section 518 on the ground that, as applied, section 518 was impermissibly vague. *See People v. Fulvio* ("*Fulvio II* ") 517 N.Y.S.2d 1008, 1009–10 (N.Y. Crim. Ct. 1987).[5] In the course of its ruling, the court concluded that, based on "the facts developed in this case," "the pertinent legislative history," and "the position of the People," "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Id.* at 1011 (emphasis original). Although Fulvio had testified that "the signs in his station clearly stated the 'cash price' and the 'credit price' for his gasoline," *id.* at 1010, the court found it

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[5] In an earlier decision in the same case, the court rejected Fulvio's argument that section 518 was impermissibly vague on its face. *See People v. Fulvio* ("*Fulvio I* ") 514 N.Y.S.2d 594, 596–97 (N.Y. Crim. Ct. 1987).

"clear that conviction may be had under the literal terms of GBL § 518 regardless of sign displays," *id.* at 1011. In the court's view, "§ 518 creates a distinction without a difference; it is not the act which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis original).

Although *Fulvio* is one of the few reported cases involving prosecution under section 518, defendants attempt to dismiss it as a kind of aberration and to find support for their interpretation of section 518 in the definitions of the terms "surcharge," "discount," and "regular price" that existed under the now-lapsed federal statute. But in enacting section 518 the New York legislature chose not to enact those definitional provisions. And even if it had, the federal definitions, like section 518 itself, make no mention of how prominently a seller's credit-card price must be disclosed or whether it may be expressed in dollars and cents or a percentage.

Nor can defendants point to any case law or official pronouncement that would limit section 518's scope to match the lapsed federal definitions. To the contrary, the Attorney General's most recent enforcement actions under section 518 are inconsistent with the federal definitions. As the federal legislative history shows, the federal definitions were designed to "permit[] merchants to have two-tier pricing systems," provided that "*when prices are tagged or posted*, the consumers will be exposed to the highest price *when they see a tagged or posted price.*" S. Rep. No. 97–23, at 4 (emphasis added).[6] In a series of sweeps in 2008 and 2009, however, then-Attorney General Andrew Cuomo enforced section 518

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[6] *See also* Cash Discount Act § 102 (defining "regular price" as (1) the "tag or posted price" for an item if a single price is tagged or posted, or (2) the credit-card price if (a) no price is tagged or posted, or (b) two different prices are tagged or posted, one for cash and one for credit).

against sellers that had no tagged or posted prices, but had only announced their prices orally.[7] These recent enforcement actions are fatal to defendants' reliance on the federal definitions. Contrary to defendants' contention, sellers have every reason to fear, based on recent history, that section 518 will be enforced beyond the bounds of its federal precursor.

For all of these reasons, the Court rejects defendants' reading of the statute, and concludes that all of the plaintiffs here legitimately fear that section 518 may be enforced against them. All of the plaintiffs accordingly have standing.

The Court therefore turns to the merits of plaintiffs' First Amendment claim. It is axiomatic that "[t]he First Amendment protects against government regulation and suppression of speech on account of its content." *United States v. Caronia*, 703 F.3d 149, 162–63 (2d Cir. 2012). Content-based restrictions on speech "require[] heightened scrutiny" and are "presumptively invalid." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 2667 (2011). These general principles apply "whenever" the government restricts speech based on the message it

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[7] In a representative case, an investigator called a small home heating oil company "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [the company] charge[s] a fee on top of that price for using a credit card." Decl. of Michael Parisi ¶ 6. The Attorney General took the position that that constituted the imposition of an unlawful surcharge under section 518. The company ultimately entered into an Assurance of Discontinuance, which included an agreement to refund "all previously imposed surcharges" over a specified period. *Id.*, ex. A, ¶ 9. The Attorney General took the same position in numerous other cases around the same time. *See* Decl. of John Conover ¶¶ 3–5; Decl. of Donna Zasowski ¶¶3–6; Second Decl. of Deepak Gupta ("Second Gupta Decl."), exs. F, H (press releases announcing settlements with numerous other heating-oil companies).

conveys, and "[c]ommercial speech is no exception," *id.* at 2664. "Criminal regulatory schemes, moreover, warrant even more careful scrutiny." *Caronia*, 703 F.3d at 163.

Plaintiffs claim that section 518 is unconstitutional under these principles because it is an unsupportable content-based restriction on disfavored speech—specifically, speech that describes an extra charge for credit-card usage as a credit-card "surcharge." Defendants, however, contend that section 518 on its face regulates non-expressive conduct—"impos[ing] a surcharge"—not speech. In the alternative, to the extent the statute can be read to regulate speech, defendants contend that it merely imposes a disclosure requirement, a type of regulation subject only to rational basis review. *See Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir. 2010).

Defendants' arguments are unpersuasive. For all the reasons already stated, section 518 draws the line between prohibited "surcharges" and permissible "discounts" based on words and labels, rather than economic realities. So read, the statute clearly regulates speech, not conduct, and does so by banning disfavored expression.

It bears noting, however, that even if section 518 somehow could be construed as defendants propose, it would still violate the First Amendment. To begin with, even as defendants read it, section 518 plainly regulates speech. Indeed, defendants' suggestion to the contrary turns the speech-conduct distinction on its head. Defendants argue that while "[i]t is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it," the statute "does not dictate the *content* of that communication at all," because "sellers are free to set the credit card price at whatever level

they wish." Defs.' Mem. at 37. Thus, in defendants' view, setting prices (which section 518 does not regulate) is speech, but communicating those prices to customers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.

Defendants' argument that their reading of section 518 does nothing more than impose a disclosure requirement fares no better. To be sure, the Supreme Court has held that the government may constitutionally require commercial speakers to disclose truthful factual information as long as it is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). But section 518 on defendants' reading does not merely impose a disclosure requirement, because disclosure alone is not sufficient for compliance. Rather, on defendants' reading, the statute also prohibits sellers from advertising their cash price in a way that causes consumers to perceive it as the regular, baseline price against which all other prices are measured.

It is instructive in this regard to compare defendants' interpretation of section 518 with Minnesota's surcharge law. Minnesota's law provides:

> A seller of goods or services may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means, *provided (1) the seller informs the purchaser of the surcharge both orally at the time of sale and by a sign conspicuously posted on the seller's premises....*

Minn. Stat. § 325G.051(1)(a) (emphasis added). A seller who fully complied with Minnesota's disclosure requirement would still violate defendants' reading of section 518 if it displayed its cash price one iota more prominently than the credit card price. In this sense, defendants interpret section 518 as an *anti*-disclosure statute, as they read the statute to bar a seller from disclosing its cash price even marginally more conspicuously than its credit-card price.

Because even on defendants' interpretation, section 518 contains not just a disclosure requirement but also an "outright prohibition[] on speech," *id.* at 650, *Zauderer's* lenient standard of review is inapplicable, and the statute must be subjected to "heightened judicial scrutiny." *Sorrell*, 131 S. Ct. at 2664. In particular, commercial speech has traditionally been subject to intermediate scrutiny, which directs courts to consider (1) whether the regulated speech "concern[s] lawful activity and [is] not ... misleading," (2) "whether the asserted governmental interest" justifying the regulation "is substantial," (3) "whether the regulation directly advances the governmental interest asserted," and (4) whether the regulation "is not more extensive than is necessary to serve the governmental interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Section 518, however it is interpreted, cannot pass muster under this standard, for three reasons.[8]

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[8] Because the Court easily concludes that section 518 fails intermediate scrutiny, it need not resolve plaintiffs' argument that the statute sweeps up both commercial and noncommercial speech, subjecting the law to strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988); *Brown v. Entm't Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011). The Court notes, however, that commercial speech generally includes speech that "does no more than propose a commercial transaction." *United*

First, the speech restricted by section 518 concerns lawful conduct and is non-misleading. The regulated speech pertains solely to dual pricing, which all parties agree is lawful in itself. And while defendants make much of the fact that credit-card surcharges may be misleading if they are hidden or inadequately disclosed, "the States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982). The Court finds nothing "inherently misleading" about a seller describing a price difference as a credit-card "surcharge" or displaying its credit-card price with marginally less prominence than the cash price. *Id.* Indeed, by truthfully and effectively conveying the true costs of using credit cards, surcharges can actually make consumers more informed rather than less, thus furthering rather than impeding the purposes of the First Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

States v. United Foods, Inc., 533 U.S. 405, 409 (2001), or is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson*, 447 U.S. at 561. In this case, while price information no doubt proposes a transaction and relates to economic interests, "what is going on here is more than just a debate about how best to sell toothpaste." *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008). Plaintiffs want to convey not only the terms of a transaction, but also *why* prices are what they are and *who* is responsible. Given current debates over swipe fees and financial regulation more generally, those questions have a powerful noncommercial valence. *See id.* at 504–05 (discussing a regulation prohibiting a seller from including a line item on an invoice separately detailing the cost of a particular tax); *Bloom v. O'Brien*, 841 F. Supp. 277, 280–81 (D. Minn. 1993) (similar).

Second, section 518 does not "directly advance[]" any interest in protecting consumers from deception. *Cent. Hudson*, 447 U.S. at 566. To the contrary, insofar as it prohibits credit-card surcharges that are not misleadingly presented, the statute actually perpetuates consumer confusion by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage. It would be perverse to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow "directly advances" the goal of preventing consumer deception.

Moreover, even to the extent it can be said to prevent misleading speech, section 518 is riddled with numerous "exemptions and inconsistencies [that] bring into question the purpose" of the statute. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). While defendants express concern for consumers who may be lured into a transaction they cannot complete without incurring additional unannounced charges, section 518 applies to only one particular type of additional charge: credit-card surcharges. The statute thus does not actually ensure that the most prominently displayed price consumers encounter will reflect the highest price they will have to pay, since handling charges, shipping costs, service fees, processing fees, "suggested tips," and any number of other types of additional charges—which consumers may or may not be able to take steps to avoid—may still be added on top.

Furthermore, even with respect to credit-card surcharges, New York has created numerous exceptions to section 518 for the state itself and certain favored utilities.[9] Defendants offer no explanation for why credit-

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[9] *See* N.Y. Crim. Proc. Law § 420.05 (authorizing York courts to impose "a reasonable administrative fee" on individuals who pay

card surcharges are somehow less deceptive when imposed by the Water Board, for example, than when imposed by ordinary commercial retailers like the plaintiffs. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999) ("[T]he Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the [speaker].")[10]

Finally, section 518 is far broader than necessary to serve any asserted antifraud purpose. New York easily could have limited its regulation to surcharges that are deceptive or misleading. Alternatively, it could have passed a provision similar to Minnesota's surcharge law, which permits credit-card surcharges so long as the seller "informs the purchaser of the surcharge both orally at the time of sale and by a sign conspicuously posted on the seller's premises." Minn. Stat. § 325G.051(1)(a)(1). And even in the absence of any statute specifically regulating surcharges, New York

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court-imposed fines or fees "by credit card or similar device"); N.Y. Crim. Proc. Law § 520.10(1)(i) ("[A]ny person posting bail by credit card or similar device ... may be required to pay a reasonable administrative fee."); N.Y. Pub. Auth. Law § 1045–j(4–a)(b) (allowing the Water Board to "accept credit cards as a means of payment of fees, rates, rent or other charges," and to impose "a reasonable administrative service fee not to exceed the costs incurred by the water board in connection with such credit card transaction."); N.Y. Pub. Serv. Law § 92–c(9) (allowing telecommunications providers to collect a "premises or location surcharge" for calls originating in the state that are charged to a credit card).

[10] As one commentator has observed, these kinds of exceptions make little sense "unless one sees them as an implicit acknowledgement that when the government plays the role of a merchant, it too does not want to be stuck with any of the transaction costs of credit." Levitan, The Antitrust Super Bowl, *supra*, at 285 n. 92.

already has laws on the books prohibiting false advertising and deceptive acts and practices. *See* N.Y. Gen. Bus. Law §§ 349–350–a. For all these reasons, section 518 is plainly overbroad.

The Court accordingly concludes that section 518, however interpreted, violates the First Amendment.

The Court now moves on to plaintiffs' claim that section 518 is impermissibly vague. "As one of the most fundamental protections of the Due Process Clause, the void-for-vagueness doctrine requires that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (internal quotation marks omitted). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "The degree of vagueness tolerated in a statute varies with its type: economic regulations are subject to a relaxed vagueness test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all." *VIP of Berlin*, 593 F.3d at 186 (internal quotation marks omitted). Here, section 518 is subject to the strictest vagueness scrutiny, as it both chills First Amendment rights and imposes criminal penalties. In addition, the statute also contains no "scienter requirement," thus potentially setting "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (internal quotation marks omitted).

With these standards in mind, the Court has little difficulty concluding that, to the extent liability under section 518 turns on the labels that sellers use to describe their prices, the statute is impermissibly vague. Indeed, defendants make no attempt to defend the statute so interpreted, conceding that it is "untenable." Defs.' Mem. at 32. That concession is well taken. In the words of the court in *Fulvio II*:

> [it] is intolerable ... that the gasoline station operator careful enough or sophisticated enough to always characterize the lower of [his] prices as a "discount for cash" may enter his automobile at the end of his business day and drive home a free man; however, if the same individual, or his colleague operating the station down the street, *or* his *employee* is careless enough to describe the higher price in terms which amount to the "credit price" having been derived from *adding* a charge to the lower price, he faces the prospect of criminal conviction and possible imprisonment.

517 N.Y.S.2d at 1015 (emphases in original).

Defendants' reading of section 518, whereby the statute simply requires sellers to display their credit-card prices at least as prominently as their cash prices, would present a closer question under the Due Process Clause. But as explained above, defendants' narrowing interpretation strays markedly from the ordinary plain meaning of the statute's text, and therefore cannot save it. *See Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (holding that federal courts may narrowly construe a state statute to avoid constitutional problems only if the statute is "readily susceptible to the limitation" (internal quotation marks omitted)).

The Court accordingly concludes that section 518 is also void for vagueness.

The Court now addresses plaintiffs' claim that section 518 is preempted by the federal Sherman Antitrust Act. While plaintiffs have not moved for a preliminary injunction on this claim, defendants have moved to dismiss it. In general, federal law preempts state law if the federal law does so expressly, if the federal law occupies the entire regulatory field, or if the state law conflicts with federal law such that "compliance with both federal and state regulations is a physical impossibility" or the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012) (internal quotation marks omitted). In the antitrust context, the Supreme Court has held that the Sherman Act preempts state law only if the state law necessarily mandates, authorizes, or causes an antitrust violation. *See Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 265 (1986). Applying that standard, the Second Circuit has held that a state or local law can be preempted if it has unreasonable "anticompetitive effects." *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993).

Here, the complaint alleges that by preventing retailers from effectively communicating the costs of credit-card usage to consumers, section 518 "insulates credit card companies from competition, causes the costs of credit to skyrocket, and frustrates the purposes of federal antitrust law—just as Visa and MasterCard's no-surcharge rules did." FAC ¶ 52. According to plaintiffs, because those contractual rules "constituted an antitrust violation, the no-surcharge law that now carries them out does so as well." *Id.* Defendants, however, argue that plaintiffs' preemption claim fails, because, properly interpreted, the statute "is *pro*-competitive: By requiring sellers to prominently disclose the credit card price, § 518 [enables] consumers to make an informed decision

whether the higher credit card price is worth paying at an early moment in the transaction when they can feasibly switch cash." Defs.' Mem. at 42 (emphasis original).

Defendants' argument that section 518 fosters rather than impedes competition presents a factual question that cannot be resolved on a motion to dismiss. Because plaintiffs do not allege or argue that section 518 constitutes a *per se* unlawful restraint of trade, the statute must be subjected to a fact-intensive analysis under "rule of reason." That standard directs "the factfinder [to] weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (internal quotation marks omitted).

Plaintiffs have more than plausibly alleged that section 518 violates the rule of reason. To begin with, the statute imposes a surcharge ban indistinguishable from the bans that Visa and MasterCard recently dropped from their retailer contracts as part of an antitrust settlement. In addition, state and federal no surcharge laws like section 518 were enacted in the name of consumer protection at the behest of the credit-card industry over the objection of consumer advocates. And furthermore, as explained above with respect to plaintiffs' First Amendment claim, the "fit" between the statute's asserted purpose of protecting consumers and its actual scope and effect is dubious at best. Defendants may be able to produce evidence to undercut or rebut these considerations when this claim is fully adjudicated, but the claim cannot be dismissed at this stage of the case.

Having addressed the merits of each of plaintiffs' three claims for relief, the Court turns finally to the remaining factors relevant to the issuance of a preliminary injunction.

First, it is plain that plaintiffs will suffer irreparable harm in the absence of an injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Court has already explained why all plaintiffs reasonably fear that section 518 will be enforced against them, and the plaintiffs' sworn declarations detail how that fear burdens and chills the exercise of their right to free speech.

Defendants assert that plaintiffs' injury is actually monetary in nature, since plaintiffs desire to impose surcharges in order to recoup and reduce the costs of swipe fees. Monetary harms are usually not irreparable. *See, e.g., Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011). But free expression is no less protected merely because it has an economic impact or motive. *See Sorrell*, 131 S. Ct. at 2665. And section 518 does not merely cause a monetary injury that then incidentally burdens plaintiffs' free speech rights; instead, it directly prohibits and penalizes free expression. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) (drawing this distinction). That injury is cognizable and irreparable.

Defendants also argue that plaintiffs' delay in bringing this action belies their claim of irreparable harm. To be sure, "[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights," and delay thus "tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). But

any delay in this case was not unreasonable. As noted, the controversy over section 518 only became "live" after Visa and MasterCard dropped their contractual bans on surcharges in January of this year as part of an antitrust settlement. In May, Visa and MasterCard were still working to give retailers the technical ability to impose surcharges over the relevant networks. *See* Decl. of Gary B. Friedman ¶¶ 1–5. This suit was then filed on June 4, 2013. Furthermore, as of the date of this Opinion, the antitrust settlement still has not been finally approved. *See In re Payment Card Interchange Fee Merchant Discount Antitrust Litig.*, No. 05–MD–01720 (JG)(JO) (E.D.N.Y. fairness hearing held Sept. 12, 2013). Plaintiffs have not sat on their rights, and have more than adequately shown irreparable harm.

As to the public interest, the public has an undeniable interest in having access to full and accurate information.

As the Supreme Court has explained, even in the context of purely commercial information, "[t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). "Advertising," moreover, "though entirely commercial, may often carry information of import to significant issues of the day." *Id.* These values are well exemplified by plaintiffs' desired speech. Consumers make decisions about methods of payment millions of times every day, and credit-card surcharges convey information that is critical to those decisions. The information conveyed by surcharges also is relevant to current debates over swipe fee regulation, as well as financial regulation more broadly. And even beyond the informational content of surcharges, sellers' inability to effectively inform consumers of the true costs of credit has the effect of

artificially subsidizing credit at the expense of cash, increasing overall credit-card usage and consumer debt.

Accordingly, for the foregoing reasons, the Court hereby preliminarily enjoins the defendants from enforcing section 518 of the New York General Business Law during the pendency of this case, and denies defendants' motion to dismiss in full. In addition, the stay of proceedings imposed on August 14, 2013 is hereby lifted. The parties are directed, within one week of the date of this Order, to jointly telephone Chambers to schedule further proceedings in this case. The Clerk of the Court is directed to close documents numbered 26 and 49 on the docket of this case.

SO ORDERED.

APPENDIX E

United States Court of Appeals,
Second Circuit

Nos. 13–4533, 13–4537

EXPRESSIONS HAIR DESIGN, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,
Plaintiffs–Appellees,

v.

Eric T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, Charles J. Hynes, in his official capacity as District Attorney of Kings County,
Defendants–Appellants.

January 13, 2016

Appeals from the United States District Court for the Southern District of New York

ORDER REGARDING PETTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of January, two thousand sixteen.

Expressions Hair Design, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, David Ross,

Plaintiffs - Appellees,

v.

Eric T. Schneiderman, In his official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, District Attorney Charles J. Hynes, in his official capacity as District Attorney of Kings County,

Defendants - Appellants.

ORDER

Docket No. 13-4533(L)
13-4537(con)

Appellees have filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court